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THE RULE-MAKING AUTHORITY
IN THE
ENGLISH SUPREME COURT

THE RULE-MAKING AUTHORITY
IN THE
ENGLISH SUPREME COURT

BY
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GOWEN FELLOW IN THE LAW SCHOOL OF THE
UNIVERSITY OF PENNSYLVANIA, 1913-15

WITH AN INTRODUCTORY PREFACE BY
T. WILLES CHITTY
OF THE INNER TEMPLE, BARRISTER-AT-LAW, A MASTER OF THE
SUPREME COURT OF JUDICATURE, AUTHOR OF
CHITTY'S KING'S BENCH FORMS, EDITOR
OF THE YEARLY PRACTICE, ETC.

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**UNIVERSITY OF PENNSYLVANIA
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NUMBER 4

EACH volume in this series has been made a publication of the School of Law of the University of Pennsylvania by a vote of the Law Faculty. The authors are associated with the school as members of the teaching staff, fellows, or graduate students.

The object of the University is to promote the scientific study of legal problems—historical and practical, and to assist in the improvement of the law.

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"A procedure cannot, any more than a constitution, be born full grown. . . . Any change must be initiated and worked out by the present practitioners as best it can. The new rules must not fit too tightly at first and in some respects must be left to be shaped by experience. It must be remembered, too, that it is a difficult thing to embody what is very much in the nature of an alteration of the spirit of a procedure in distinct specific rules."

Solicitors' Journal, 1875.

"Does any one suppose that the great fight with formalism is over? . . . Formalism may be driven out of pleading, there may be no arguable points left on rules of procedure, but the hydra heads have their own devilish immortality, and will be grinning at you again in captious perversions of statute law."

Sir F. Pollock, in "The Genius of the Common Law."

*TO MY WIFE,
Joyful sharer in the
pleasure and the labor
of this writing*

NOTE.

The contents of this book first appeared as articles in the University of Pennsylvania Law Review, the Law Quarterly Review, the Law Magazine and Review, and the Journal of the Society of Comparative Legislation, to the editors of which the author is indebted for permission to reprint. The material for the articles was gathered during a stay of the author in London for two years, in which time he was assisted by a host of generous friends, to name whom would unfairly associate them with the defects of this work. Especial thanks, however, are due for their many personal kindnesses, to Lord Muir Mackenzie, G.C.B., sometime Permanent Secretary to the Lord Chancellor; the Rt. Hon. Lord Cozens-Hardy, Master of the Rolls; the Rt. Hon. Lord Justice Pickford; His Honour Sir W. L. Selfe and His Honour Judge Radcliffe, Judges of County Courts; Sir John Macdonell, K.C.B., King's Remembrancer; Master Willes Chitty; the Rt. Hon. Sir Frederick Pollock, Bt.; Sir Courtenay P. Ilbert, G.C.B.; and Mr. C. E. A. Bedwell, Librarian of the Middle Temple. The warmth of their welcome to a wandering student of the law has helped to make England to him forever dear.

PREFACE.

It is now over forty years since the English Judicature Acts and the Rules of Court contained in the schedule to the Act of 1875 came into force. It is over thirty years since the Rules of 1875 were superseded by the Rules of 1883. Since 1883 the Rules of that year have been amended, altered, added to, annulled, restored and re-amended by some five hundred rules. The time has therefore come when a judgment may be formed as to the efficiency of these rules and when an account of them and of the rule-making authorities cannot fail to be welcome. Such an account is contained in the admirable essays collected in this volume, and I believe that this is the first time it has been attempted. Mr. Samuel Rosenbaum has dealt with the subject from the historical point of view and traced the rules from their introduction through the various amendments, alterations, and additions down to the present time. He has also dealt with our English Rule Committee and the County Court Rule Committee

and the work of each of these bodies. I have read Mr. Rosenbaum's essays with great interest, and can testify to the accuracy of the statements contained in them. Indeed, I am astonished at the painstaking research and labour which he has devoted to the task, and at the practical, detailed, and accurate knowledge of our procedure which he has acquired and which he lays before his readers.

The object of all proceedings in Courts of Civil Jurisdiction is to ascertain the rights, duties, and liabilities of the parties according to law, and to give effect to those rights and enforce the performance of those duties and liabilities. These proceedings cannot be conducted without rules. These rules must of necessity be technical. They should also be practical, that is to say adapted to meet the actual requirements of the practice. They should also be elastic and constantly kept up-to-date. The question by what authority those rules can best be made is one of much interest, and towards the solution of this question Mr. Rosenbaum's essays will prove an important contribution.

In England the Supreme Court rules are made by a Rule Committee, composed of judges,

practising barristers, and solicitors. In view of Mr. Rosenbaum's detailed description I shall not attempt to deal with its work. With most of his comments and conclusions I agree, but I think that the Committee would be improved and its work rendered more effective if more practitioners engaged in active practice were placed upon it, and if it met more often and more regularly. That the rules made by this Committee are, however, far better and far more effective than any that have been, or are likely to be, produced by our English legislature no one can, I think, doubt. Instances of rules relating to matters of practice and procedure made by our legislature are not wanting, and such rules have for the most part proved unworkable and ill adapted to the requirements of actual practice.

Nearly all the Rules of Court, at all events in England, deal with Interlocutory Proceedings; that is to say, they deal with matters which take place out of Court, and with matters of detail and machinery with which the average legislator is not acquainted and which he is too busy to attend to or be interested in. Such rules concern most the practitioners and the Judges or officials, and it would seem to follow that they

are best made by those who have to use and apply them and who are actually acquainted with the constantly changing requirements of everyday practice.

From over forty years of practical experience, I can thoroughly endorse Mr. Rosenbaum's conclusions as to the advantage to be obtained by "entrusting the regulation of Civil Procedure to a professional body rather than to a well-intentioned but overworked legislature."

T. WILLES CHITTY.

ROYAL COURTS OF JUSTICE, LONDON,
March 18, 1916.

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THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT.

CHAPTER I.

INTRODUCTION.

In no province does the familiar constitutional doctrine of the separation of powers break down more completely than in the special field of the law of civil procedure occupied by what we know as the rules of practice. The substantive law of the State may lay down with the greatest precision the rights of an individual, and how far their infringement will be repaired by legal remedy, but to the person wronged the question of how and when he can obtain his remedy is equally important. Suitors are not satisfied with syllogisms; they are more interested in the results. It is therefore necessary to provide a means by which the litigant can, with proper expedition and directness, pass through contention and obtain the satisfaction he desires. Upon what department of the State should that duty be placed? Is the function of prescribing rules of procedure executive, judicial, or legislative? In so far as it pertains to the carrying out and practical enforcement of substantive law, it is an executive duty; in so far as it aids judges to arrive at the true issues in controversy, it is judicial; and in so far as it has a binding effect upon the conduct of the parties, it is of legislative nature. Undoubtedly it partakes of all three of the

attributes enumerated. It appears, therefore, that no one of the three branches of our Government is, by the theory of the Constitution or the character of the duty, so peculiarly fitted for this work that the other two must be excluded from consideration. In such a position, the guiding principle becomes one of expediency. Now expediency is a matter on which there may be argument, and different conclusions may be arrived at by different minds, though faced with the same problems and seeking the same ends.

It is by some such process of reasoning that the impartial observer must explain to himself why it is that the great nations on opposite sides of the Atlantic who rule themselves by legal principles developed out of a common law have come to such different conclusions as to the method of defining the practice by which those principles are applied to specific disputes. Although practically all of the United States are committed to the plan of issuing practice rules from their State capitols by way of legislative fiat, the people of England place in the hands of their judges the power to mold and alter the practice of the courts. In Pennsylvania, as in her sister states, suitors and courts alike are ruled in their conduct by an iron hand that reaches out from the statute books¹; in England the rules of procedure are not master but servant to the courts, ever studying and conforming to the progress of the times.²

¹ Observe, for instance, the mandatory refinements of the Execution Act of 1836, P. L. 755, or of the Service Act of 1901, P. L. 614, as samples of rigid enactments.

² Lord Collins, M. R., said, in *Re Coles and Ravenhear*, [1907] 1 K. B. 1, 4: "Their relation to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules which are, after all, only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular cause."

The motives behind these strikingly different conclusions are, in some measure, capable of historical explanation. The courts of Pennsylvania were, from their very beginning, tribunals not of a superior power, but of the people themselves, set up not to serve as channels for the outpouring of royal grace and favor, but to provide for a mutual settlement of disputes among the inhabitants.³ Indeed, legal proceedings in early Pennsylvania were more in the nature of arbitrations than of lawsuits, for "before the Revolution the Bench was rarely graced by professional characters."⁴ The Council of the Colony, in its capacity of representative of the people, deciding on all matters affecting the public weal, naturally undertook the task of shaping the power and procedure of the courts it created. Thus began the custom which is still observed to-day. An omniscient legislature still undertakes to solve all problems that trouble the good people of Pennsylvania, and in occasional moments of respite from the tasks of social reform it hammers out, by way of change, a rule or two for the courts.

The English courts, on the other hand, were not the people's but the King's. The Crown, in the English Constitution, is the fountainhead of justice. However much of a fiction the participation of the King in public affairs may be to-day, he was, in the early days, in a very real sense the dispenser of right. It was to him,

³ Lawrence Lewis, Jr., in a paper on "The Constitution, Jurisprudence and Practice of the Courts of Pennsylvania in the Seventeenth Century," read before the Historical Society of Pennsylvania March 4, 1881, published in *Pennsylvania Magazine of History and Biography*, vol. 5, p. 141, and reprinted in *Annual Report of the Pennsylvania Bar Association*, 1895, vol. 1, p. 353. See W. H. Loyd: *Early Courts of Pennsylvania* (University of Pennsylvania, 1910).

⁴ From an address delivered in Philadelphia in 1826 by William Rawle, Sr., quoted in *Bar Association Report* (*op. cit.*), p. 6.

personally, or to his Chancellor, that pleas were addressed and it was by him or by his deputies that judgments were rendered. Until the signing of Magna Carta, his court even followed him when he departed from Westminster. Obviously, the methods and proceedings of the King's justices were not, in the beginning, matter for supervision by the Parliament. First by decisions and directions given in particular cases, and later by rules and orders formulated for general use,⁵ the judges of each of the superior courts gradually built up a procedure suited to the character of the issues that came before them for trial.⁶ So well recognized was this form of authority when Parliament set out upon its career as law reformer about the middle of the nineteenth century,⁷ that, rather than upset a useful and established custom, it clothed the custom with its sanction and elevated it to the dignity of statute law.⁸ Such, briefly,

⁵ The courts have at common law jurisdiction to make general rules for the regulation of the practice before them. *Bartholomew v. Carter*, 3 Manning & Granger, 125 (1841).

⁶ "Technically on the same legal footing as the modern Statutory Orders in Council, but in fact, and historically, inclining somewhat heavily towards judicial legislation, are the various Rules and Orders affecting the practice of the courts, which have from time to time been published. These go back for a long period in English legal history; and it is impossible, without further research into the archives of the fourteenth century, to state definitely when they began." Edward Jenks: *A Short History of English Law* (London, 1912), p. 190. See Kerly: *History of Equity* (Cambridge, 1890).

⁷ Under pressure of the growing commercial interests in the country and of the popular agitation worked up by the novels of Dickens (see E. S. Roscoe: *The Growth of English Law*, London, 1912, p. 199) and the propaganda of Bentham (see A. V. Dicey: *Law and Public Opinion*, London 1905, p. 208).

⁸ "A beginning was made with the Civil Procedure Act, 1833 (3 & 4 Will. IV, c. 42, s. 3), which authorized any eight of the Common Law judges (including the three Chiefs) to make rules for the reform of pleading; and the step, having been found beneficial, was

is the historical background of the present Rule Committee as constituted under the Judicature Acts.

Apart from these interesting historical speculations, the mere fact that there exist two such divergent streams leading from a common source is in itself sufficient excuse for exploring the courses of both. To this incentive must be added the interest which the best American lawyers are beginning to take in the importance of logical modifications in our system of civil procedure.⁹ The present work will attempt to describe the rule-making power now exercised by the English Bench and

repeated, with wider reach, in the year 1850 (13 & 14 Vict., c. 16). These two statutes, which were temporary in their effect, were incorporated, with many additional powers, into the Common Law Procedure Acts of 1852 and 1854 (Act of 1852, §§223-225; Act of 1854, §§97-98). Meanwhile, in the year 1850, a similar provision, with a limited scope, had been introduced into the Chancery Amendment Act of that year (13 & 14 Vict., c. 35, §§30-32); empowering the Chancellor, with the concurrence of the Master of the Rolls and one of the Vice-Chancellors, to make General Rules and Orders for carrying out the objects of the Act. In the Chancery Amendment Act of 1858, this power was extended to cover virtually the whole procedure of the Court (21 & 22 Vict., c. 27, §§11-12); the rule-making body being enlarged to include the newly created Lords Justices of Appeal in Chancery. Under this power the great Consolidated Orders of 1860 were issued, and thus the way made easier for the reform undertaken by the Judicature Act of 1873." Jenks (*op. cit.*), p. 191. Under the Act of 1833 the judges issued the Hilary Rules of 1834; the Rules issued under the Acts of 1852 and 1854 may be found in Day: Common Law Procedure Acts (4th ed., London, 1872), p. 413 *et seq.* There also appear Rules made under the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict., c. 67), the Judges' Chambers (Despatch of Business) Act, 1867 (30 & 31 Vict., c. 68), and the Debtors Act, 1869 (32 & 33 Vict., c. 62).

⁹ For instance, "Canadian Sidelights on Prospective Changes in Pennsylvania Procedure," by David Werner Amram, in 62 University of Pennsylvania Law Review, 269 (1914). For opinions outside the State, see literature published by the American Judicature Society (Chicago), and the Report of the New York Board of Statutory Consolidation (Albany, 1912), p. 9.

the use that has been made of it since it was bestowed in 1875.¹⁰ If we are to decide, on grounds of expediency, where best to put the rule-making power in Pennsylvania, the English experience must be deemed admissible evidence, and its weight can be determined by those who have to pass upon it.

¹⁰ The original Judicature Act was introduced by Lord Chancellor Selborne and passed in 1873, to take effect in November, 1874. But in 1874 a change in administration occurred; the new Government deferred the operation of the Act until November, 1875, when, together with certain changes and improvements introduced by Lord Cairns, the new Lord Chancellor, it finally came into operation. It is not often that political opponents collaborate so generously, even in law reform.

CHAPTER II.

THE SUPREME COURT.

It is necessary, in the first place, to understand the general organization of the court set up by the Judicature Acts. American students of law are apt to think of those Acts as being a sort of political upheaval which accomplished, with one stroke, the complete fusion of law and equity. In fact they were, in one way, much less than that, and in another much more.¹ Long before 1875, the three superior courts of common law at Westminster² had been authorized by statute to take cognizance of certain equitable rights and to administer certain equitable remedies. Under the Common Law Procedure Acts, the law of the common law courts corresponded closely to what we have at the present day. in Pennsylvania, where, for historical reasons and with little statutory assistance, the courts administer a great deal of equity through the forms of common law.³ The Court of Chancery, too, had been commanded, by the provisions of the Chancery Amend-

¹ "The main object of the Judicature Act was to assimilate the transaction of equity business and common law business by different courts of judicature. It has been sometimes inaccurately called 'the fusion of law and equity'; but it was not any fusion or anything of the kind; it was the vesting in one tribunal the *administration* of law and equity in every cause, action or dispute which should come before that tribunal." Sir George Jessel, M. R., in *Salt v. Cooper*, 16 Ch. Div. 544, 549 (1880).

² Before the completion of the new Royal Courts of Justice, at Temple Bar, in the Strand, in 1882, the Courts of King's Bench, Common Pleas and Exchequer sat at Westminster, and the Court of Chancery sat at Lincoln's Inn.

³ Troubat & Haley (6th ed., Phila., 1913), vol. 1, c. 2.

ment Acts, to recognize certain rights and forms that had previously been considered legal, as opposed to equitable. There were, therefore, even before the Judicature Acts, equitable powers in the common law courts and legal powers in the Court of Chancery.⁴ The Judicature Acts were a final step which removed the remaining distinction between the two, in point of jurisdiction,⁵ and infused the spirit of equity into the whole administration of justice.⁶ This was but the logical consummation of a development that had been in progress for nearly half a century.

⁴ The general effect of these Acts is described as follows, by the Royal Commission of 1867, whose Reports were the basis for the Judicature Act of 1873 (in the Report of March, 1869): "By virtue of these Acts the Court of Chancery is now, not only empowered, but bound to decide for itself all questions of Common Law without having recourse, as formerly, to the aid of a Common Law Court, whether such questions arise incidentally in the course of a suit, or constitute the foundation of a suit, in which a more effectual remedy is sought for the violation of a Common Law right, or a better protection against its violation than can be had at Common Law. The Court is further empowered to take evidence orally in open Court, and in certain cases to award damages for breaches of contract or wrongs as at Common Law; and trial by jury, — the great distinctive feature of the Common Law, — has recently, for the first time, been introduced into the Court of Chancery.

"On the other hand, the Courts of Common Law are now authorized to compel discovery in all cases, in which a Court of Equity would have enforced it in a suit instituted for the purpose. A limited power has been conferred on Courts of Common Law to grant injunctions, and to allow equitable defences to be pleaded, and in certain cases to grant relief from forfeitures."

⁵ § 24 of the Act of 1873 (36 & 37 Vict., c. 66) is the keynote of this part of the Acts.

⁶ § 25 of the Act of 1873 concludes (subsec. 11): "Generally in all matters not hereinbefore mentioned, in which there is any conflict or variance between the Rules of equity and the Rules of the common law with reference to the same matter, the Rules of equity shall prevail." This section has been held to apply not to substantive rights but to practice.

But the great triumph of the Acts was in the revolution they brought about in the organization of the courts and in their methods of procedure. True, they left the nominal forms of separate courts still standing.⁷ But these courts, instead of being walled off from each other as before, now sit, as it were, merely in different corners of one great hall. They are all divisions of the Supreme Court, with equal powers and jurisdiction. Although in effect the business is divided into two main departments,⁸ the chancery and the common

⁷ Under the Act of 1873, the High Court consisted of five Divisions: Chancery, Queen's Bench, Common Pleas, Exchequer, and Probate Divorce and Admiralty. But after the death of Lord Chief Baron Kelly on September 17, 1880, and of Lord Chief Justice Cockburn on November 20, 1880, the Exchequer, Queen's Bench and Common Pleas Divisions were reduced and consolidated into one Division, the Queen's (now King's) Bench, by an Order in Council of December 16, 1880, which came into force February 26, 1881 (Statutory Rules and Orders, 1903, vol. 12, p. 1). The Supreme Court is therefore now constituted as follows: the High Court, in three Divisions, and the Court of Appeal. The Court of Appeal consists of the Master of the Rolls and five Lords Justices of Appeal (although it can be enlarged if occasion demands, as the Lord Chancellor, all ex-Lord Chancellors, the Lord Chief Justice and the President of the Probate Divorce and Admiralty Division are members *ex officio*; see also note 15, *infra*). The High Court contains the Chancery Division, consisting of the Lord Chancellor (who, in fact, never sits) and six justices; the King's Bench Division, presided over in fact as well as in name by the Lord Chief Justice, containing eighteen justices; and the Probate Divorce and Admiralty Division, where there are only two justices, one of them the President of the Division. What time the Lord Chancellor can devote to judicial work is divided between the House of Lords (which hears appeals from the three Supreme Courts of the United Kingdom) and the Judicial Committee of the Privy Council (which hears appeals from the Supreme Courts of all the British dependencies).

⁸ Apart from the varied work done by the Probate Divorce and Admiralty Division, which is naturally small in comparison with that of the other two Divisions.

law,⁹ the forms of action are alike in each, and a litigant is not embarrassed by the choice.¹⁰

It is clear, therefore, that justice is now administered in England not by courts but by judges. The old fictions

⁹ § 34 of the Act of 1873 made a general catalogue, subject to Rules of Court, of the causes to be assigned to each Division of the High Court. Under it all actions in their nature equitable are assigned to the Chancery Division. But it is left to the discretion of the judge, guided by the balance of convenience, whether he will retain or transfer a cause assigned contrary to the provisions of the section. *Bradford v. Young*, 26 Chanc. Div. 656 (1884). In Gibson and Weldon; Practice of the Courts (London, 1912), the matter is put thus (pp. 10-11): "Though, if a plaintiff bring an action, say for specific performance of a contract to sell real estate, he is bound to commence it in the Chancery Division, yet this does not rob the King's Bench Division of its power, as a part of the High Court . . . to decree specific performance. Thus, suppose A brings an action against B for misrepresentation. The Division to which he would assign his action would be the King's Bench Division. But B might set up as a counterclaim against A, a claim to have a contract to sell land specifically enforced; and, in spite of this counterclaim coming within the class of subjects specifically assigned to the Chancery Division, the King's Bench would have just as much power to decree specific performance as the Chancery Division. Another example is afforded by *Pinney v. Hunt*, 6 Chanc. Div. 98 (1877), in which it was laid down that the Chancery Division has full power to grant probate of a will in an action for partition, Jessel, M. R., saying, 'It is clear that all the judges of the High Court have the same jurisdiction, and any judge may, if he choose, retain the action and exercise the jurisdiction.' . . . Subject to cases which seem to show that one division may, but will not lightly, encroach on the exclusive jurisdiction of another, it may be taken as certain that the assignment of special business to each division does not give wholly exclusive jurisdiction in that business to that particular division, but amounts to a mere direction that, as a matter of convenience and to facilitate expedition, an action involving a special cause of action must be assigned to its appropriate division."

¹⁰ "In the case of *in re Besant*, 11 Chanc. Div. 508 (1879), Sir George Jessel tried an action in which the claim was for an injunction to restrain a lady from breaking a covenant in a deed of separation between herself and her husband, and the lady counterclaimed

and traditions of the rival courts of law and equity have been swept away,¹¹ and in their place the sound discretion of the judiciary has been left free to declare the rights and settle all controversies between parties in a single proceeding.¹² To match the new powers over substantive law bestowed upon the judges, they have been given the widest possible latitude as to the arrangements they consider best for disposing of and distributing actions among themselves, and, equally important, for the regulation of the procedure which those actions must follow from beginning to end.

for a judicial separation. . . . In practice, the matter rests with the judge before whom the matter is brought. If he thinks that it would be better tried by a judge of another division, he forces the parties to assign it to that division." R. Storry Deans: *Students' Legal History* (3d ed., London, 1913), p. 155. Thus the parties are spared delay and the utmost penalty is the costs of transfer.

¹¹ "The ordinary civil jurisdiction of the Court of King's Bench rested upon the absurd fiction that the defendant in an action, *e. g.* for a debt, had been guilty of a trespass. The ordinary civil jurisdiction of the Court of Exchequer rested upon the equally absurd fiction that the plaintiff in an action was a debtor to the King, and, owing to the injury or damage done him by the defendant, was unable to pay his debt to the King. . . . These long labyrinths of judge-made fictions seem to a lawyer of today as strange as the most fanciful dreams of 'Alice in Wonderland.'" Dicey (*op. cit.*), p. 91.

¹² § 24 (7) of the Judicature Act, 1873, provides that in every action the court shall grant "all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter; so that, so far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." It is very frequent for plaintiffs to ask both legal and equitable relief in the same writ; for instance, to ask for an injunction together with damages for trespass, or for an account together with damages for breach of contract, or, in the alternative, for specific performance, *etc.*

Short of appointing additional judges (and even that can be done, in time of emergency¹³) the Lord Chancellor and his colleagues on the bench have complete control over the organization of the Supreme Court,¹⁴ the size of its divisions,¹⁵ the length of its sittings and vaca-

¹³ Under §§ 29 and 37 of the Judicature Act, 1873, the Lord Chancellor is empowered to appoint Commissioners of Assize, who may hear causes on circuit and have all the powers of judges. This is done when, either through illness or the need for judges in London, there are not enough judges available in the King's Bench to cover all the circuits. See note 19, *infra*.

¹⁴ Under § 32 of the Judicature Act, 1873, the number of divisions of the High Court may be increased or decreased, upon the recommendation of the Council of Judges to the Privy Council. See notes 21 and 22, *infra*. It was under this section that the Order in Council which consolidated the Queen's Bench, Common Pleas and Exchequer Divisions was made in 1880. See note 7, *supra*.

¹⁵ Under § 32 of the Judicature Act, 1873, the number of judges permanently attached to any division may be increased or decreased by Order in Council. Divisional Courts, which have taken the place of the old Court in Banc, are to be held regularly, composed of two judges, under § 17 of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict., c. 59), but under § 4 of the Judicature Act, 1884 (47 & 48 Vict., c. 61), there may be more than two judges if, at any time, considered expedient by the President of the Division and two other of its members. The Lord Chief Justice may order more than one Divisional Court to sit, if business in the King's Bench so requires, and a majority of the judges in the Division so agree, under § 41 of the Judicature Act, 1873. Under § 6 of the Appellate Jurisdiction Act, 1908 (8 Edw. VII, c. 51), the Lord Chancellor may build up additional courts, of three members each, in the Court of Appeal, by requesting judges of the High Court to sit, temporarily, in the Court of Appeal. Similarly, under § 51 of the Judicature Act, 1873, he may call upon any permanent member of the Court of Appeal to sit as an additional judge in any Division of the High Court. Or, by transfer of judges temporarily from one Division, the size of another can be increased if necessary; see note 17, *infra*. Finally under § 37 of the Judicature Act, 1873, it is left to the judges of the King's Bench Division to make arrangements among themselves for the sittings for trials by jury, so that the greatest number of courts may be sitting at all times.

tions,¹⁶ the assignment and transfer of judges to or from one division or another,¹⁷ the arrangements for the work done in London, in district registries¹⁸ and on circuit,¹⁹

¹⁶ § 26 of the Judicature Act, 1873, abolishes terms of court, and provides for the distribution of sittings according to Rules of Court; see note 7, Chap. III, *infra*. § 27 provides that orders regulating the vacations may be made, revoked or modified by Order in Council upon recommendation of the judges. Under this section two changes have been made in the Long Vacation (which now runs from August 1 to October 11), one on December 12, 1883 (Statutory Rules and Orders, 1903, vol. 12, p. 7), and another on March 1, 1907 (W. N., Mar. 16, 1907, p. 79).

¹⁷ Besides the temporary transfer from the High Court to the Court of Appeal and *vice versa* (see note 15, *supra*), the Lord Chancellor may transfer or assign any judge from one Division of the High Court to another, either because of the illness of a judge, or to sit as an additional judge, with the concurrence of the President of the latter Division. This transfer may be either temporary, under § 5 of the Judicature Act, 1884, or permanent, under § 31 of the Judicature Act, 1873.

¹⁸ As the High Court is a court of original jurisdiction over all of England and Wales, the Judicature Acts have provided a system of provincial offices of the Court in places more or less remote from London, where all the steps in an action from summons to execution, with the exception of the actual trial, may be taken. Each of these District Registries is in charge of a Registrar, who exercises most of the powers of a judge in chambers with relation to interlocutory applications. Under § 60 of the Judicature Act, 1873, the number and position of these Registries may be prescribed by Order in Council, and proceedings therein regulated by Rules of Court. Under the Order in Council of May 19, 1899 (Statutory Rules and Orders, 1903, vol. 12, p. 932), and three subsequent Orders, eighty-nine of these Registries have been created, their Districts usually coinciding with the County Courts circuits.

¹⁹ At certain times of the year, the judges of the King's Bench Division visit a number of towns all over England and Wales, to hold trials of actions. The country is divided into eight Circuits, and sittings (assizes) are held in fifty-six different places two or three times a year (four times in Liverpool, Manchester and Leeds). There is always about a half of the King's Bench judges travelling the circuits. As venue has been abolished, the place of trial of an

and the disposition to be made of funds in court.²⁰ Sometimes this power is exercised through the form of a council of all the judges,²¹ sometimes through a resolution of the King's Privy Council in the form of a statutory Order in Council,²² and frequently by the Lord

action (irrespective of whether the action is going on at the Central Office in London, or in a District Registry) is made to suit the convenience of the parties, and is always fixed, if not in London, at the assize town where it will be cheapest to collect all the parties and witnesses. Under § 23 of the Judicature Act, 1875 (38 & 39 Vict., c. 77), the arrangements for circuits and assizes, as to places and times, are made by Order in Council. No less than fourteen Orders are now in force under this power, the effort being to do away with assizes where the volume of business does not warrant the expense. More than half of all the civil actions tried on circuit are tried in Manchester, Liverpool, Birmingham and Leeds; only about four hundred trials a year are held in all the other fifty-two assize towns together. There is a strong feeling that the circuit system is too costly, for the results it shows.

²⁰ Under § 24 of the Judicature Act, 1875, the Lord Chancellor, with the concurrence of the Treasury (who are presumably more expert in purely financial matters) may make Rules for the disposition of funds in court. At the present time, the Supreme Court Funds Rules, 1905, are in force, under the Chancery Funds Act, 1872 (35 & 36 Vict., c. 44), the Judicature Act, 1875, the Judicature (Funds) Act, 1883 (46 & 47 Vict., c. 29), and the Judicature Act, 1894 (57 & 58 Vict., c. 16).

²¹ Orders in Council affecting the length of vacations or the number of Divisions or of judges in them can be made only upon the "report or recommendation of the Council of Judges of the Supreme Court." By § 17 of the Judicature Act, 1875, this Council can be made up of five of the Presidents of the Divisions and Lords of Appeal, together with a majority of the *puisne* judges in the three Divisions of the High Court. There is another Council, consisting of all the judges, constituted by § 75 of the Judicature Act, 1873, whose duty it is to meet annually and discuss the working of the Act and of the Rules, but it has held only three meetings since 1875. In practice, such discussion goes on informally among the judges all the time, so the formal meeting has been dispensed with.

²² These have no counterpart in the American scheme of government. Parliament passes many Acts which create new duties for the

Chancellor or the Lord Chief Justice, either alone²³ or with the concurrence of other Government departments or other members of the judiciary.²⁴ When the

administrative departments to perform; such Acts frequently contain a provision that leaves the lesser details to be settled and promulgated by Orders in Council, such Orders to be read as part of the Act. This allows of changes in administrative detail to meet conditions as they arise, without either violating the broad directions of the statute or throwing the burden on an already overworked legislature. "The Privy Council never meets as a whole now, except for ceremonial purposes. . . . The adoption of Orders in Council is a formal matter, requiring the presence of only three persons, who follow the directions of a minister, for all Cabinet ministers are members of the Privy Council." (Lowell: *The Government of England*, New York, 1908, vol. 1, p. 79.) Thus the head of the department affected has a fairly free hand in setting new policies of the legislature into practical operation. See notes 14 to 19, *supra*, for the functions of the Privy Council under the Judicature Acts.

²³ In practice, nearly all administrative details are settled by the Lord Chancellor or the Lord Chief Justice, acting alone. Sometimes a merely formal concurrence is required from the head of another Division. See notes 17 and 20, *supra*, and 24, *infra*. Under § 83 of the Judicature Act, 1873, the Lord Chancellor (with the concurrence of the Lord Chief Justice) may determine the number, qualifications and tenure of official referees. There are now three of these, to whom, in rotation, are referred all issues of fact which involve complicated accounts or lengthy inspection of documents. They have all the powers of a judge. The Lord Chancellor may, at any time, call an extraordinary council of all the judges, under § 75 of the Judicature Act, 1873 (see note 21, *supra*), but very seldom does. Under § 15 of the Judicature Act, 1879, he may, with the concurrence of the Treasury, determine the amounts of the salaries of all officers of the Supreme Court. Frequently he is, with the concurrence of other Government officers, empowered by specific statutes to make rules for their legal operation.

²⁴ As to arrangements for jury trials, see note 28, *infra*. As to Divisional Courts, see note 15, *supra*. At the request of the President of the Probate Divorce and Admiralty Division, probate causes may be heard by a judge of the Chancery Division (with the consent of the Lord Chancellor), or of the King's Bench Division (with the consent of the Lord Chief Justice). § 44 of the Judicature Act, 1873.

cause list is in such a state, in any division, that actions are too long delayed, additional judges are transferred to the division from another which is not so far behind.²⁵ Within a division itself, judges can be assigned to handle specific kinds of cases, who are more expert than their colleagues in particular fields.²⁶ Trials are not held up because of the illness or absence of a judge, as his place can be taken by another judge or by a commissioner delegated thereto.²⁷ Jury trials and non-jury trials may be begun or continued at any part of the sittings, in accordance with the state of the lists and the number of judges available for the work.²⁸ Causes may be trans-

²⁵ See notes 15 and 17, *supra*. As to probate causes, see note 24, *supra*. A similar power in Pennsylvania would enable the courts of the large cities to bring their dockets into such shape, without extra expense, that actions could be tried within a fortnight after issue is joined.

²⁶ In the King's Bench Division, one of the judges is assigned to hear all bankruptcy causes; another sits in all trials before the Railway and Canal Commission Court, whose jurisdiction is under special statutes which provide that railway and canal companies shall afford reasonable facilities to all, without undue preference; two judges are told off to hear all disputes over elections to Parliament; and one judge is selected before whom are tried all causes in a special list called the Commercial List, which includes actions on policies of insurance, contracts for carriage by sea, and all similar matters. In the Chancery Division, the winding-up of companies (voluntary or involuntary dissolution of business corporations) is regulated by Part IV of the Companies Consolidation Act, 1908 (8 Edw. VII, c. 69); two judges are assigned to do the judicial work under the statute. Finally, all issues in which lengthy accounts must be taken, or documents inspected, or scientific matters investigated, come before official or special referees or arbitrators, so that the judges are not delayed by them at all.

²⁷ See notes 13, 17 and 24, *supra*.

²⁸ § 30 of the Judicature Act, 1873, provides that jury trials shall be held continuously throughout the year by as many judges as the business to be disposed of may render necessary, and § 37 of the same Act makes the sittings for trial by jury subject to arrangements by

ferred from one judge's list to another, even after they have been reached for trial, and they may be set down for trial on specific days or in specific places in the list, if occasion demands, instead of going down to the foot of the list.²⁹ The place of trial may be made either London or some town in the country, according as the convenience of the majority of the parties and witnesses demands.³⁰ In short, all things may be done which will make it physically possible for the court to get on quickly with its work; the individual members are not immovable pillars of the Temple of Justice, but go hither and thither at the command of the High Priest, giving ear to the petitions of all the faithful.

This system, simple and elastic, leaves entirely to the discretion of the bench itself the organization and arrangement of its work, free of legislative interference.³¹ In

mutual agreement between the judges. The actual cause lists are made up in the Central Office, under directions contained in the Judges' Regulations of September, 1888, the Judges' Resolutions of May, 1894, and general orders from the Lord Chief Justice, and published each day.

²⁹ Clauses 8, 9, 10 and 11 of the Judges' Resolutions of May, 1894, allow the judge to order, "on special grounds," that causes though postponed should keep their place in the list, that any cause in any list may be marked urgent or fixed for a day certain, and that a cause may be interpolated in the week's list even after the list has been made up and sent to the printer. Section 6 of the Judicature Act, 1884, allows a judge to whom a cause has been assigned to get another judge in his own division to hear it, for special reason, although an objecting party can force him to get the Lord Chancellor's consent. The Judges' Resolutions are, of course, liberally interpreted by the judges themselves.

³⁰ See note 19, *supra*. Official and special referees are also empowered to try issues and hear evidence in the country if necessary.

³¹ As Lowell remarks (*op. cit.*, vol. 2, p. 458), "a most elastic and intelligent method of regulating judicial procedure." After one term, it was said in the Times (November 29, 1875): "Its operation

the present state of public opinion in America, the first comment that rises to the lips of the reader is: This is too lax; there is too great opportunity for favoritism and abuse. But the conditions surrounding the English law courts are the best safeguards against that. The English newspapers give to the doings of the courts a far greater share of space than do the American dailies.³² The judges of the Supreme Court are few in number,³³ and therefore more subject to scrutiny and criticism. There are especially active and independent legal journals in London,³⁴ in whose editorial columns the administrative policy of the judges is constantly discussed and commented upon. The mutual reliance between the bench and bar is too strong to admit of misuse of power. These considerations are wholly apart from the principal and obvious one that the occupants of judicial office are, in England, usually the best type of men at the Bar, drawn from the small circle of King's Counsel who have won their way to the front rank.³⁵ It must

has tended to economize judicial power and to prevent delay of justice.'

³² The law reports in the daily Times are so complete that they are often cited in briefs and text-books, on points untouched by the more official reports. All the penny newspapers devote several columns each day to special law reports, which are usually written for them by barristers. Interesting law cases figure almost as largely in the headlines as popular sports, while the courts are sitting.

³³ There are only twenty-six who sit as judges of first instance, although their jurisdiction includes a population of nearly forty million people — the whole of England and Wales. There are, it is true, fifty-nine county court judges, but their jurisdiction is limited to £100.

³⁴ The Law Journal, Law Times, Solicitors' Journal, and Justice of the Peace are published weekly. The Law Quarterly Review and the Law Magazine and Review are more learned periodicals, which appear quarterly.

³⁵ The Law List for 1913 discloses the names of two hundred and seventy-eight King's Counsel; it is estimated there are nearly

also be remembered that we have in none of the American states an officer who corresponds to the English Lord Chancellor. His powers are far greater than those of the Chief Justice in a state system of judicature. He is, besides being the head of the English judiciary, a member of the Cabinet, a member of the Privy Council, and presiding officer of the House of Lords. His functions are to-day even more political than they are judicial³⁶; in fact he goes out of office when his party goes out of power, like the rest of the Cabinet. An appointment or order made by him has, therefore, the double aspect of being an act of the executive (for which he is directly accountable to the electorate),³⁷ and yet an exercise of judicial discretion.³⁸

ten thousand barristers living. Of late years, from ten to fifteen King's Counsel have been created annually. There is some risk involved in accepting the honor, as the etiquette of the Bar forbids a King's Counsel to accept a brief unless there is a junior briefed along with him. It is not infrequent that a barrister who has made a success as a junior does not inspire the kind of confidence necessary for larger cases, and he may find himself stranded without business after he has "taken silk" (the robe of a King's Counsel is supposed to be made of silk, while a junior's is merely "stuff"). The judges are usually chosen from the busiest of the silks. The Lord Chancellor is generally chosen by the Prime Minister from among the higher judiciary or the law officers of the Crown. He, in turn, has the appointing of the other judges, who serve "during good behavior."

³⁶ E. S. Roscoe: *The Growth of English Law* (London, 1912), p. 189: "In England changes proceed so gradually that one is apt to overlook the effect of a slow transition; it is clear, however, that the office of Lord Chancellor is now less judicial and more administrative in its nature than it was at the beginning of the reign of Victoria. The holder now fulfills more political and fewer judicial duties."

³⁷ Lord Westbury was forced to resign the Great Seal in 1865, as a consequence of censure in the House of Commons, of his laxity in the making of certain minor appointments. His downfall was, however, partly due to his personal unpopularity.

³⁸ If the Chief Justice of Pennsylvania were appointed by the incoming Governor, to hold office while the party had a majority,

Certain of his official acts are subject to a Parliamentary veto.³⁹

So much for the organization and machinery of the court itself. From this brief account, it is apparent that the Supreme Court of Judicature over England and Wales is a sort of a portable house, the parts of which may be interchanged and shifted about at will, to accommodate the crowds that frequent it. But even more versatile is the procedure which has grown up under the Acts. Containing within itself all the elements of development and improvement, it alters almost automatically with the demands of changing years. This spirit of accommodation and change is the most striking feature of the manner in which the rule-making power has been used.

with the right to appoint all the state judges, and, upon retirement, became a paid life member of the State Senate, he would occupy approximately the political position of the English Lord Chancellor. This merely by way of illustration.

³⁹ § 25 of the Judicature Act, 1875, provides that any Order in Council made under the Acts must be submitted to Parliament within forty days, and may be annulled by that body. So also, as to Rules of Court, for which, however, see *infra*.

CHAPTER III.

THE RULE COMMITTEE.

The authority to make rules of procedure is now vested in a committee of twelve persons, who include the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges of the Supreme Court, two barristers and two solicitors (the four last-named being representatives of the Bar and of the Law Councils respectively.¹ In its discretion lies the

¹ The Judicature Act, 1875 (§17), left it in the hands of a sort of general council of the Bench. But this was found rather vague, so the following year, in the Appellate Jurisdiction Act, 1876 (§17), a definite Rule Committee of six judges was constituted. Five years later (§19 of the Judicature Act, 1881, 44 & 45 Vict., c. 68) the size was increased to eight members, including the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Divorce and Admiralty Division, and four judges of the High Court named by the Lord Chancellor. In 1894 it was thought advisable to add to the Rule Committee a few active practitioners, which was provided by §4 of the Judicature Act, 1894. That Act made the President of the Incorporated Law Society (the association of the London solicitors), for the time being, a member of the Committee, and empowered the Lord Chancellor to appoint two additional members, of whom at least one must be a barrister in practice. This was not entirely a success, as the Law Society changes its President annually, so that the one solicitor on the Committee hardly had a chance to take part in its work. The defect was repaired by the Rule Committee Act, 1909 (9 Edw. VII, c. 11), which enacted that the General Council of the Bar (as representing the barristers) should choose two of their number to sit in the Rule Committee, that the Council of the Incorporated Law Society (representing the London solicitors) should have one member on the

making or amending of all rules affecting the sittings of the court, the duties of its officers, pleading, practice, procedure, and costs of proceedings therein.² Within the scope of its authority, rules can be made, amended, or repealed as frequently as it considers necessary, and the power has been freely used.

The statutes make no stipulation as to the times for its meetings or the routine it should observe in its deliberations. Its organization is therefore very simple. Its only officer is its secretary, who is also the Lord Chancellor's, a permanent official in the civil service.

Committee, and that the Lord Chancellor should appoint a fourth practitioner, who must be a member of a provincial Law Society (therefore, a solicitor). Under these provisions, there are at the present time in the Rule Committee a King's Counsel and a junior, to speak for the barristers, a London solicitor and a Liverpool solicitor to represent the solicitors. They all take an active interest in the Committee's work. The four judges appointed by the Lord Chancellor include one member of the Court of Appeal, one member of the Chancery Division, and two from the King's Bench, although such an arrangement is optional with him.

² These are the general terms used in §17 of the Judicature Act, 1875. More specific provisions of the Acts, as to the scope of the Committee's authority, will be cited *infra*. The right of the Committee to make rules for procedure in the Supreme Court is exclusive, with these exceptions: (1) Under §15 of the Judicature Act, 1875, the enactments in respect to appeals from County Courts may, by Order in Council, be made to apply to appeals from other inferior courts of record. This covers the old Borough Courts, many of which still survive. (2) Under §18 of the same Act, the general Rules of the Supreme Court do not apply to divorce proceedings; they are regulated by the President of the Probate Divorce and Admiralty Division, under the powers conferred on him by §53 of the Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85). (3) Certain statutes confer the power to make rules for their legal enforcement upon the Lord Chancellor in concurrence with other named officials or bodies in the public service; such are the court funds Acts, for which see note 20, Chap. II, *supra*, the Solicitors Remuneration Act, 1881 (44 & 45 Vict., c. 44), *etc.*

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Meetings of the full committee take place two or three times a year, at the call of the Lord Chancellor, and take place in his room at the House of Lords, or in the rooms of the Lord Chief Justice or the Master of the Rolls at the Royal Courts in the Strand. Such meetings are, as a rule, for the purpose of taking definite action on some change which has been proposed. It must not be supposed, however, that these are the only occasions on which there is any consideration of new rules. It is a characteristic of the English judges that they are shy of formal meetings when friendly discussion can accomplish the same ends, and before the actual meeting takes place, the member proposing the change will probably have talked it over with two or three of his colleagues and settled fairly definitely the wording of the proposal. Sometimes the full committee will depute to a sub-committee the task of considering the advisability of a proposed change, or of settling the form of a new rule, but this has been done only rarely. Suggestions come to the committee in a variety of ways. The persons who come to it most frequently with new ideas are the masters of the Supreme Court, who come into personal contact with all the solicitors and counsel engaged in active litigation. They are the officers most intimate with the operation of the court's practice, as it is their duty to stand guard over the steps taken in each action and see that the game is fairly played. It has recently been suggested that there should be a master on the Rule Committee. What happens in such a case is that the masters have talked the matter over in one of the monthly meetings they hold, and threshed it out carefully. If the suggestion survives that ordeal, the master who made it will frame a tentative draft of a new rule embodying it and will make a personal call on one of the judges with it. All the judges and masters are in the same building, so this is not a difficult business;

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the Master of the Rolls seems to be the judge who is usually approached by the masters, but that is a purely personal matter. If the judge considers the suggestion a useful one, he will probably obtain the opinion of one or two of the other judges upon it, and then reserve it for the next meeting of the committee. Or, if it is a subject of immediate importance he will communicate it to the Lord Chancellor, who will then call a meeting of the full committee for the earliest convenient date. Not infrequently, suggestions come from the great body of the practitioners themselves. A number of solicitors may have encountered the same difficulty in respect to some point of practice. They have the subject brought up at a meeting of the Council of the Law Society; if some definite possibility of remedy emerges from the discussion, the Council will request its member to submit it to the whole committee in the shape of a new rule or an amendment. So also the General Council of the Bar, acting for the other branch of the profession, can speak through the two barristers it has on the committee. The Bar Council is not as active, in this connection, as that of the solicitors, probably because the details of procedure do not trouble the barrister so much as they do his professional client; it is the solicitor who must placate the irate layman when rules stand in his way. On occasion, other legal bodies or officers, such as provincial Law Societies, or the Public Trustee, may make recommendations based on personal experience. The Lord Chancellor's Permanent Secretary is the channel through which the general public are invited to send complaints and suggestions. In every case, the final decision as to whether or not action is necessary rests entirely with the committee, which is not hampered in its consideration of the facts by statutory regulations of any kind. To pass a rule the votes of at least five members of the committee are necessary, of whom the

Lord Chancellor must be one, so that he has a practical right of veto upon the exercise of this power.³

When the conclusion is reached that a change of any kind is needed, the committee is, however, obliged to publish due notice of it in the Gazette.⁴ It usually publishes the full text of the draft rules, of which printed copies may be obtained of the official printer at a fixed price per folio, by any public body.⁵ The legal journals invariably publish such drafts also, with comment upon them. Interested parties then have forty days within which to send to the committee criticisms of the draft rules, or fresh suggestions. These must be considered by the committee, and forty days after the first publication it may issue the new rule or rules, either in their original form or as altered,⁶ and the rules are then considered "made." They go into effect either at once, or at a specific future time stated in the committee's resolution,⁷ and are then as binding upon the profession

³ Under §19 of the Act of 1881. See Dr. Heinrich B. Gerland: *Die Englische Gerichtsverfassung* (Leipzig, 1910) p. 288: "Das Rule Committee hat den Entwurf der Rules aufzustellen, hat also das Initiativrecht. Der Entwurf bedarf zu seiner Fertigstellung stets der Zustimmung des Lord Chancellor, der also insofern ein unbedingtes Vetorecht hat."

⁴ §1 (1) of the Rules Publication Act, 1893 (56 & 57 Vict., c. 66).

⁵ §1 (2) of the Rules Publication Act, 1893.

⁶ Alterations in the original draft are, of course, entirely discretionary with the committee. It takes advantage of this preliminary publication to hear expressions of opinion, and not infrequently does change its original draft. The new Poor Persons Rules (which regulate actions brought *in forma pauperis*) have been altered and postponed several times as a result of adverse criticism upon their first publication.

⁷ As allowed by §1 (2) of the Act of 1893. The usual custom is to pass the Rules near the end of one "sittings," to come into operation at the beginning of the next. The year is divided by Rule of Court (Order LXIII, Rule 1) into four Sittings and a Long Vacation, as follows:

and upon parties as though they were part of an Act of Parliament. Parliament has reserved to itself a right of veto upon such rules. Within forty days after they are "made," the new rules must be laid by the committee before both Houses of Parliament.⁸ If, thereupon, within the next forty days, either House passes an address to the Crown requesting that the rules or any of them be annulled, the Privy Council may make an Order in Council annulling them,⁹ without prejudice to proceedings that have, meanwhile, been taken under them. Otherwise they stand as made.

With the admirable foresight of the Judicature Acts, there is a further provision that in any case of urgency, the committee may make rules to take effect at once, without the requirement of forty days' prior publication. These, however, must be merely provisional rules, to stand only until the committee is able to promulgate final rules through the regular channels.¹⁰

Although its powers are wide, the scope of the committee's authority is fairly well defined and delimited by the Judicature Acts. There are certain bounds beyond which it may not go, and certain roads which it is obliged to follow. But the territory assigned to it is a large one, and it should be of interest to American lawyers to note how much less hampered it is by statute

Hilary Sittings: January 11 to the Wednesday before Easter.

Easter Sittings: Tuesday after Easter Week to the Friday before Whit Sunday.

Trinity Sittings: Tuesday after Whitsun Week to July 31.

Long Vacation: August 1 to October 11.

Michaelmas Sittings: October 12 to December 21.

⁸ § 25 of the Judicature Act, 1875.

⁹ It is eloquent of the care with which the committee does its work, that there seems to be no instance in which Parliament has exerted this right.

¹⁰ § 2 of the Rules Publication Act, 1893. This power has been exercised some half-dozen times.

than are the somewhat similar informal committees of judges who, in America, exercise what discretionary power there is in the Bench to make its rules.

In two very broad sections are contained the bulk of the committee's duties. The first is:

"The jurisdiction [of the Supreme Court] shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such Rules and Orders of Court as may be made pursuant to this Act,"¹¹

and the second reads:

"Rules of Court may be made for regulating the pleading, practice and procedure in the [Supreme] Court, and, generally, for regulating any matters *relating* to the practice and procedure therein."¹²

These are flanked on either side by an array of provisions which expressly enumerate some of these general powers. First are the sections relating to certain statutes; the old court rules under which a number of statutes were administered are made subject to alteration by the committee¹³; any rules of procedure actually laid down in statutes passed prior to 1875 are subject to be modified by the committee, so as to fit in with the new rules¹⁴; the committee may make new rules for the proper carrying out of any statutes passed after

¹¹ § 23 of the Judicature Act, 1873.

¹² From § 17 (2) and (3) of the Judicature Act, 1875.

¹³ § 5 of the Judicature Act, 1894 (57 & 58 Vict., c. 16). A schedule to the Act applies this power specifically to the Vexatious Suits Act, 1697, the Transfer of Stock Act, 1800, the Courts Funds Act, 1829, the Civil Procedure Act, 1833, the Judgments Acts, 1838 and 1840, the Court of Chancery Act, 1841, the Common Law Procedure Acts, 1852 and 1860, the Lis Pendens Act, 1867, and the Partition Act, 1868.

¹⁴ § 24 of the Judicature Act, 1875. Rules made under the Juries Act, 1870, appear in Statutory Rules and Orders, 1903, vol. 12, p. 674.

1875 which impose new duties upon the court¹⁵; and there is a saving clause that all old procedure not affected by the new rules is to remain in force.¹⁶ Then follow two sections relating to inferior courts; the committee may regulate procedure on appeals from inferior courts to the High Court¹⁷; and its concurrence must be obtained to any rules made for the practice and procedure in inferior courts.¹⁸ The very important matter

¹⁵ § 22 of the Judicature Act, 1879. Such power is expressly included in the Settled Estates Act, 1877 (40 & 41 Vict., c. 18, s. 42); the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict., c. 31, s. 21, and 45 & 46 Vict., c. 43); the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict., c. 26, s. 39); the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict., c. 59, s. 6); the Settled Land Act, 1882 (45 & 46 Vict., c. 38, s. 46); the Conveyancing Act, 1882 (45 & 46 Vict., c. 39, s. 2, 5); the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27, s. 11); the Local Government Acts, 1888 and 1894 (51 & 52 Vict., c. 41, s. 29 and s. 89; 56 & 57 Vict., c. 73, s. 70); the Statute Law Revision Act, 1888 (51 & 52 Vict., c. 57, s. 1, 2); the Charitable Trusts (Recovery) Act, 1891 (54 & 55 Vict., c. 17, s. 6); the Mail Ships Acts, 1891 and 1902 (54 & 55 Vict., c. 31, s. 3, 8; 2 Edw. VII, c. 36); the Finance Act, 1894 (57 & 58 Vict., c. 30, s. 10); the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60); the West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict., c. 166, s. 14, 4); the Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict., c. 8, s. 3); the Judicial Trustees Act, 1896 (59 & 60 Vict., c. 35, s. 4); the Special Juries Act, 1898 (61 & 62 Vict., c. 6, s. 1, 2); the London Government Act, 1899 (62 & 63 Vict., c. 14, s. 29); the Open Spaces Act, 1906 (6 Edw. VII, c. 25, s. 4, 3); the Merchant Shipping Act, 1906 (6 Edw. VII, c. 48, s. 68); and the Finance (1909-10) Act, 1910 (10 Edw. VII, c. 8, s. 33, 4). The Rules made under these Acts are either incorporated into the main body of the Rules of 1883 (which are now in force, as amended from time to time,) or published as separate appendices. The full list is given to illustrate how frequently the Rule Committee is called on in this way. In the case of technical statutes, it is usually assisted by the appropriate Government department. See Chapter XIII.

¹⁶ § 21 of the Judicature Act, 1875.

¹⁷ § 23 of the Judicature Act, 1884.

¹⁸ § 24 of the Judicature Act, 1884. Rules of the County Courts are prepared, in the first instance, by a committee of five judges,

of practice on appeals from the High Court to the Court of Appeal is completely in the committee's control,¹⁹ as is the equally important one of costs,²⁰ although in respect to costs there is a further stipulation that they shall, subject to the rules, be entirely in the discretion of the trial judge, who "shall have full power to determine by whom and to what extent such costs are to be paid."²¹ The power to make rules includes the useful one of prescribing forms, and many needless explanations are saved by the setting out of numerous forms in appendices to the rules.²² The Rule Committee is then empowered to settle the details about the vacations

under the County Courts Act, 1888 (51 & 52 Vict., c. 43, s. 164); Rules for the other inferior courts of record (the Borough and Hundred Courts) are prepared by the judge of each court.

¹⁹ § 19 of the Judicature Act, 1873: "Appeals may be taken . . . subject to such Rules and Orders of Court for regulating the terms and conditions . . . as may be made."

²⁰ § 17 (3) of the Judicature Act, 1875.

²¹ § 5 of the Judicature Act, 1890. Costs, in England, differ from costs as usually understood in Pennsylvania in two particulars. First, they include the charges of solicitor and counsel; second, they are itemized to show the charge made for every separate act done, pleading drawn or paper copied. It is therefore a material penalty if a party is obliged to pay the costs of any particular step in the action in which he has been remiss. Even though a winning party may obtain the general costs of the action from his defeated opponent, he may himself be ordered by the judge to pay any costs which have been unnecessarily incurred — for instance, by forcing his opponent to call witnesses to prove a fact which might just as well have been admitted on the record. Solicitors are sometimes ordered to pay costs out of their own pockets, if it appears they incurred them in bad faith, simply to increase the bill.

²² § 100 of the Judicature Act, 1873. The forms given include writs of summons, entries of appearance, indorsements on writs, notices, affidavits, interrogatories, admissions, statements of claim, defences, counterclaims, replies, judgments, praecipies and writs for executions, subpoenas, summonses and orders for interlocutory applications, bonds, accounts, and general forms for various aspects of chancery and probate business and taxation of costs.

and sittings,²³ the distribution of work among the divisions and judges,²⁴ and the character of the proceedings to be taken in District Registries.²⁵ Finally, the general powers conclude with some suggestions as to methods by which to facilitate the trial of issues of fact: the rules may provide for official or special references,²⁶ or for arbitrations,²⁷ and prescribe all the procedure to be followed before such referees and arbitrators²⁸; they may confer upon a master the powers of a judge under the Arbitration Act,²⁹ and they may allow courts to call in assessors with whose assistance difficult issues of fact may be tried.³⁰

These general powers were, to a slight extent only, cut down by certain specific provisions in the Acts, which were necessary principally to define the new double jurisdiction, legal and equitable, and because of the creation of such altogether new judicial bodies as the Court of Appeal and the Divisional Courts. Full recognition of all rights and liabilities and granting of all remedies, both legal and equitable, are dictated in the keystone section of the Act of 1873,³¹ and the following section of the Act makes the equity procedure supersede that of the common law in certain actions where they had

²³ §§ 26 and 27 of the Judicature Act, 1873.

²⁴ §§ 33 and 36 of the Judicature Act, 1873.

²⁵ §§ 64, 65 and 66 of the Judicature Act, 1873. They may also prescribe what records and documents should be kept in District Registries. See note 18, Chap. II, *supra*.

²⁶ § 13 of the Arbitration Act, 1889 (52 & 53 Vict., c. 49); § 57 of the Judicature Act of 1873. See notes 23 and 26, Chap. II, *supra*.

²⁷ § 14 of the Arbitration Act, 1889.

²⁸ § 15 of the Arbitration Act, 1889.

²⁹ § 21 of the Arbitration Act, 1889.

³⁰ § 56 of the Judicature Act, 1873. This is done in most Admiralty cases, which are heard by a judge and two retired sea-captains—a picturesque tribunal.

³¹ § 24 of the Judicature Act, 1873.

conflicted.³² As to the Court of Appeal, it is laid down that interlocutory orders may be made by a single judge,³³ that motions for new High Court trials must be made in that court and heard by three judges,³⁴ and what matters are appealable, with and without leave.³⁵ Then it is enacted that appeals to the High Court from inferior courts should be heard by Divisional Courts,³⁶ that Divisional Courts may not be appealed from without their leave,³⁷ and that points of law may be reserved by High Court judges for argument before or consideration by a Divisional Court.³⁸ These matters are partly jurisdictional, but are mentioned here because of their bearing on procedure.

More specific restraint is put on the Rule Committee by three prohibitions and a few definite rules embodied

³² § 25 of the Judicature Act, 1873. Subsection 8 allows the court to issue a *mandamus*, grant an injunction or appoint a receiver, by an interlocutory order, in any case where it appears "just or convenient."

³³ § 52 of the Judicature Act, 1873.

³⁴ § 1 of the Judicature Act, 1890. But by consent of the parties, they may, under § 1 of the Judicature Act, 1899, be heard by two judges.

³⁵ No order made by consent, or as to costs (§ 49 of the Judicature Act, 1873) and no interlocutory order (§ 1 of the Judicature Act, 1894) may be appealed from without leave (except in certain cases enumerated in the section). All practice points go to the Court of Appeal, which may give leave to appeal from an interlocutory order even after the judge below has refused it. The practice on applications for leave to appeal is defined in an Order of Court.

³⁶ § 1 of the Judicature Act, 1894.

³⁷ § 45 of the Judicature Act, 1873.

³⁸ § 46 of the Judicature Act, 1873. But this is subject to the right of every party in a jury trial, under § 22 of the Judicature Act, 1875, to have rulings on the evidence admissible, and a direction to the jury based thereon, so that exceptions may be taken on the ground of an improper charge. It should be added that a motion for a new trial based on such exceptions is treated with suspicion, unless they affect the substantial merits of the case.

in the statutes. The former are: First, that the old "common injunction" may no longer stay a proceeding in any division of the court³⁹; second, that the rules do not apply to divorce proceedings⁴⁰; and last, but most important, that the rules may not alter the established rules of evidence in jury trials, or do away with oral examination of witnesses, or completely abolish the jury.⁴¹ Scattered here and there through the Acts will be found the following specific rules, which were, for various reasons, fixed beyond the Rule Committee's reach: A plaintiff may assign his action to any division he thinks proper, and all interlocutory steps must be taken in that division⁴²; every matter commenced in the Chancery Division must be assigned to a particular judge⁴³; all trials shall be, as far as possible, before a

³⁹ § 24 (5) of the Judicature Act, 1873, does away with this veteran scandal of the law courts, by allowing equitable matters which formerly would have been ground for the injunction to be pleaded in defence. A party may still, however, move for a stay on proper grounds.

⁴⁰ Under § 18 of the Judicature Act, 1875, the President of the Probate Divorce and Admiralty Division retains the power to make rules for divorce proceedings, conferred by the Matrimonial Causes Act, 1857.

⁴¹ § 20 of the Judicature Act, 1875. But an exception to this was made by § 3 of the Judicature Act, 1894, which allowed the means and mode of proving facts to be regulated by Rules of Court (1) in any proceeding for the distribution of property, and (2) in any interlocutory application in a pending cause.

⁴² § 11 of the Judicature Act, 1875. But this is to be read together with § 34 of the Judicature Act, 1873; see notes 9 and 10, Chap. II, *supra*.

⁴³ § 42 of the Judicature Act, 1873. The plaintiff marks his writ (or other paper commencing proceedings) "Chancery Division," or "King's Bench Division," which is the assignment to a Division. If it is Chancery, the writ clerk who stamps the writ assigns the matter to one of the six judges, according to a rota. That judge then has personal charge (through his own set of clerks) of all matters connected with that proceeding. The plaintiff cannot make his choice of a judge, as he can of a Division.

single judge, and all applications between trial and final judgment must be made to him ⁴⁴; a judge may hear causes for any other judge in his own division without the necessity of a formal transfer ⁴⁵; and provision must be made for the hearing of all such applications as require to be promptly heard in London during vacation.⁴⁶

To these must be added the one section which contains practically all the authors of the Judicature Acts thought necessary to insert in the statutes on the burning question of pleading,⁴⁷ the same section that blew up the last dike that stood between the waters of equity and of law. Its command to every judge of the court to take cognizance of all rights and liabilities, both legal and equitable, and to terminate the whole controversy between the parties in one action is the inspiration of the new pleading which has been created by the rules. The greatest liberality as to joinder of parties and of causes of action, as to amendment, counterclaim,⁴⁸ discovery, execution and

⁴⁴ § 17 of the Appellate Jurisdiction Act, 1876.

⁴⁵ § 6 of the Judicature Act, 1884.

⁴⁶ § 28 of the Judicature Act, 1873. Two judges are always designated to hear such applications.

⁴⁷ § 24 of the Judicature Act, 1873.

⁴⁸ Subsection 3 of § 24 is specific on the subject of counterclaim. It reads: " . . . Every judge . . . shall have power to grant to any defendant all such relief against any plaintiff or petitioner as . . . said judge might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." The subsection goes on, to bring into existence an entirely new weapon for the pleader—the "third party procedure," which enables a defendant to obtain "all such relief . . . connected with the *original* subject of the cause . . . claimed against any *other* person, whether already a party to the same cause or not, . . . as might properly have been granted against such person if he had been made defendant to a cause duly instituted by the defendant for the like purpose." The Rules drawn under this last power limit the right to cases where "a defendant claims to be entitled to *contribution* or *indemnity* over against any

a dozen other matters, has been displayed in the exercise of the duty here imposed.

This completes the list. As has been stated, the restraints on the Rule Committee's powers are few. The Judicature Acts are in no sense a code of practice, and only in a general way a code of court organization. But they contain general principles within which it is possible to exercise the widest discretion. Not to leave that discretion entirely at sea; the Act of 1875 carried with it, in a schedule, a model set of rules,⁴⁹ which were recommended for adoption, but were made wholly subject to alteration and amendment at the committee's will. A brief inspection of these rules (though they have been greatly altered since) will convey in a concrete way how very large a power was entrusted to the committee's expert hands.

person not a party to the action," but the device is frequently made use of.

⁴⁹ The schedule to Lord Selborne's Act of 1873, contained 58 Rules intended to serve the same purpose, and in the summer of 1874 the judges issued a complete set of Rules based on that schedule. But Lord Cairns' Act postponed the operation of the former Act from November 1, 1874, to November 1, 1875. The schedule of Rules in the new Act of 1875, was a consolidation of the original schedule of 1873 and the subsequent Rules of 1874, with some changes and additions. As the former rules were repealed before they went into effect, it will be sufficient to examine them in the form in which they appear in the schedule of 1875 (L. R., Statutes, 1875, p. 778 *et seq.*).

CHAPTER IV.

THE SCHEDULE OF 1875.

Every biographer prefaces his narrative with some account of his hero's parentage and antecedents, to satisfy the reader's human interest in gossip of the family connection and give to scientists material with which they can prove that either heredity or environment is the common denominator of all human affairs. No such justification can be pleaded for the following paragraphs, but the Rules of 1875 have a history of their own which, though it throws but little light upon that "intent of the legislature" which alone has legal value in the interpretation of statutes, yet cannot fail to be of interest to those students of legal reform who know how greatly its progress is influenced by the exigencies of practical politics. Especially in England, where the directing power of the Cabinet is so complete over Parliament, is the personnel of the Ministry a matter of moment to the shape which legislation will assume. In this case the interest lies in discovering why the new rules of procedure appear in the particular form of a schedule to an Act of Parliament.

In point of time, the period of the Judicature Acts corresponds to that of the rivalry of those two momentous figures in Victorian history, Gladstone and Disraeli. Their successive victories and defeats mark milestones along the road of judicature reform, though both leaders favored the principle in a general way. Without describing the agitation for law reform that characterized the sixties, it is sufficient to remark that the division of the field of remedies between equity and the common law was the irritant that urged it on, and that, like most

popular movements affecting the law, it began many years before it reached its greatest intensity and was not appeased by the fact that substantially all it asked for had already been accomplished by the Common Law Procedure Acts and the Chancery Practice Amendment Acts of the preceding decade. It was, however, strong enough to be one of the political problems which Lord Derby's Conservative Cabinet of 1866 felt itself called upon to solve. The task was set about in the typically English way: before making any proposals a Royal Commission was appointed to report on the situation and outline recommendations for any necessary changes.¹

¹ The Commission was created on September 18, 1867, with thirteen members; two more were added on October 22, 1867, and two more on January 25, 1869 (when the Liberals came in). Included among its seventeen members were three who were destined to become Lord Chancellors: Lord Cairns, then a Lord of Appeal of a year's standing, became Lord Chancellor when Lord Derby resigned and Disraeli took office in March, 1868, and again when Disraeli formed his second Cabinet in 1874; Sir William Page Wood, then a Vice-Chancellor, became Lord Chancellor Hatherley upon Gladstone's Liberal victory in December, 1868; and upon Lord Hatherley's resignation in October, 1872, Sir Roundell Palmer accepted the Great Seal and the peerage he had previously refused, to become Lord Chancellor Selborne. Another member of the Commission (added in 1869) was the Liberal Solicitor-General Sir John Duke Coleridge, who later became Chief Justice of the Common Pleas, and upon the death of Sir Alexander Cockburn in 1880, Lord Chief Justice of England. Two judges in the Commission who later became Lords of Appeal were Baron Bramwell of the Exchequer, and Mr. Justice Blackburn of the Queen's Bench, the author of *Blackburn on Sales*. Two members were later elevated to the Judicial Committee of the Privy Council — Sir Montague Smith, then a judge in the Common Pleas, and Sir Robert P. Collier (later Lord Monkswell), Gladstone's Attorney-General. Two other valuable members were Sir John B. Karslake, Disraeli's brilliant Attorney-General, and Sir R. J. Phillimore, the Judge of the Admiralty Court, a polished and scholarly master of the canon law. As these names testify, the greatest legal minds of the day were gathered together for this important investigation.

At the head of that Commission Lord Derby put his former Attorney-General, Hugh McCalmont, Lord Cairns, recognized as easily the first lawyer of his time, to whom more than to any other man the ultimate success of the whole movement must be ascribed. In the eighteen months during which the Commission worked, its chairman became Lord Chancellor for nine months,² and then another of its members took his seat upon the woolsack, but its deliberations continued unabated until finally, in 1869, it presented its first report,³ the report on which all the great reforms of the next few years were built. In less than twenty pages the report reviews the defects in the administration of the superior courts of England and sets forth a practical plan for a general consolidation and unification of jurisdiction and procedure. Such brevity, clearness and constructive genius are all too rare in the dreary wilderness of government publications.⁴

The section of the report devoted to procedure covers not five pages, but it reviews the entire progress of a litigation from beginning to end, naming specifically the weaknesses it objects to, and proposing specifically

² Lord Cairns shared Disraeli's brief first instalment of power from March to December, 1868. The defeat of the Conservatives opportunely set him free to devote his undivided attention to the work of the Commission.

³ Published March 25, 1869, as Parliamentary Paper No. 4130 (1868-69, xxv, 1). It dealt solely with the constitution of the new court it recommended and with the procedure which should be used in it. The other four reports of the Judicature Commission, published from time to time in the next few years, were the work principally of new members who were added to the Commission; they cannot compare with the First Report in any respect and have been of little practical value.

⁴ Its excellence was appreciated at once. The Law Magazine and Review said of it (Old Series, vol. 27, p. 143, 1869): "There has not, probably, for years been a Commission whose labours have proved so thoroughly satisfactory to the public."

the remedies it would apply. "We can only give a sketch in this report, of the leading principles of the system which we recommend," the section begins, "leaving for General Orders, or for a Code of Procedure, as may appear most advisable, the fuller development and completion of the scheme proposed." Then, after enumerating the suggestions evolved by the Commissioners, it concludes: "Power should be vested in the Supreme Court to regulate from time to time by General Orders the procedure and practice in all its divisions, and to make such changes in the duties of the several officers of the court as may from time to time be thought fit, and may be consistent with the nature of their appointments." These few words made it clear that the Commissioners were convinced the sections of a possible code of procedure should, at any rate, not form part of the same statute which defined the constitution and jurisdiction of the court itself. Further, the recommendation as to power in the court to make alterations in its procedure from time to time showed they thought the procedural code should not have the rigid form of an Act of Parliament. But the question of form was left open, and it turned out to be one of great importance.

Lord Hatherly was the legal head of the Government to whom the historic first report was made; he was also one of its signers.⁵ Within a very few months he introduced in the House of Lords a bill embodying the suggestions of the report as to the consolidation of the superior courts. But his bill contained only this slight reference to the important procedural changes which the creation of the new court would require: it proposed to bestow the power to make rules of procedure exclusively on a

⁵ He had not, unfortunately, the ability of his predecessor Cairns, and the fate of his Judicature Bill was partly due to his own limitations.

committee of the Privy Council,⁶ and provided that a set of rules should be drafted by that committee after the bill should have passed into law. This left the whole problem of the court's procedure up in the air. The provisions of the bill relating to the structure of the court itself were acceptable enough, but without some indication of how the machine would work, all discussion on its usefulness was perforce academic. The common law judges, just before the bill was to be brought up in the Lords for its second reading, sent to the Lord Chancellor, on May 13, 1870, a resolution which forcibly attacked this omission in the bill, among others.⁷ They said: "While the judges are agreed that subordinate rules of procedure and rules of practice may be left to be settled hereafter, they are of opinion that, looking to the great and substantial difference which exists between the procedure of the equity and the common law courts, the more important matters of procedure ought to be considered and determined by Parliament and should form part of the bill. . . . The judges submit that certain fixed guiding principles and rules should, after due consideration, be embodied in the bill, instead of being left to be decided upon hereafter." This protest was of sufficient solidity to block the passage of the bill through Parliament,⁸ and as Lord Hatherley failed to

⁶ Lord Hatherley's first draft gave to the judges the power to make Rules of Procedure, but he became convinced they would have no time to devote to such a duty and changed the section to give it the effect above described.

⁷ The personal animosity between Chief Justice Cockburn, who signed the Resolution on behalf of the judges, and Lord Hatherley, was undoubtedly increased by the Lord Chancellor's proposal to put the rule-making power into executive rather than judicial hands. Even from an unprejudiced viewpoint such a provision seems weak.

⁸ In the House of Lords itself, Lord Cairns had attacked this feature of the Bill consistently. His view, as paragraphed in 5 Law Journal, 245 (May 6, 1870), was that "the Legislature ought to

bring his measure into more practical and acceptable shape, the Government of the day withdrew its support and the Judicature bill fell by the wayside.⁹

In October of 1872, Lord Hatherley's failing eyesight forced him to give up the onerous duties of his office,¹⁰ and Gladstone offered the Lord Chancellorship again to Sir Roundell Palmer, who now saw his way clear to accepting¹¹ and took the title of Lord Selborne upon his entrance into the Upper House. He at once set about drafting a new bill to bring into being the great court recommended by the commission of which he, too, had been a member. In a few months he was ready, and on

declare the leading principles to be followed by the framers of the Rules, so that those persons may be builders, and not architects."

⁹ This was explained in 14 *Solicitors' Journal*, 829 (August 13, 1870): "What more than anything else prevented the passage of the Bill this year was, it appears to us, the unwillingness of Parliament, at any rate of the House of Lords, to delegate absolutely to anybody outside Parliament the power of dealing with everything falling under the head of procedure and practice. . . . The code of procedure ought, in outline at least, to be prepared at once, not only because Parliament is hardly likely to pass the measure at all until it is done, but also because it must be done some time before the Act can come into operation." But several years passed before this advice was followed.

¹⁰ During 1871 and 1872 the only topics of law reform discussed in Parliament were the constitution of the Judicial Committee of the Privy Council as the final Imperial Court of Appeals, and the efforts of a few far-sighted thinkers, headed by Lord Selborne, to establish in London an Imperial College of Law which should unify and supplant the scattered agencies of legal education in England and the Colonies. Little came of the first, and nothing at all of the second.

¹¹ He had refused it when Gladstone first offered it in 1868, as, being a strong Churchman, he was opposed to the Premier's policy of Church disestablishment in Ireland. This spirit of independence prompted him to reject the offer again in 1886 when Gladstone was forming his third Cabinet, because he had not joined in the Prime Minister's conversion to Irish Home Rule.

February 13, 1873, he introduced his measure in the Lords. Profiting by the experience of Lord Hatherley, he had inserted as a schedule to the bill a series of fifty-eight short rules,¹² covering the changes recommended by the Commissioners in their First Report of 1869. However, it was manifestly impossible to define the entire practice of a superior court of general jurisdiction in such brief compass, so the bill further provided for the drafting of a complete set of detailed rules and forms after it should become law, guided by the principles enunciated in the schedule.¹³ This was, at any rate, an advance, as it gave the legislature something tangible to discuss. It proved sufficiently satisfactory to be the basis of a compromise, and rather than postpone reform indefinitely again, Parliament passed the bill with minor changes, and it became law on August 5, 1873. It was not, however, to go into effect for over a year, the intention being to give ample time to draw up the complete rules and allow the profession to become

¹² Said to have been drafted by Sir George Jessel.

¹³ The comment of the Solicitors' Journal upon this was (17 Sol. J. 721, July 19, 1873): "No one is quite satisfied with the provisions of the Bill as it stands. . . . The Bill, which is in many points, especially in everything that affects procedure, a mere skeleton, has to be clothed with flesh and blood by means of Rules of Court and Forms of Proceedings. . . . To whomsoever the duty of actually framing the Rules and Forms may be entrusted, the task will be about as anxious and difficult a one as could well be undertaken, and it will only be successfully carried out if the profession generally give their assistance by free discussion and intelligent suggestion."

The barristers' journal was no less appreciative of the importance of the Rules (8 Law Journal, 129, March 1, 1873): "It may safely be averred that if the Lord Chancellor's Judicature Bill with the Schedule thereto be passed into law, the rules of procedure embodied in that Schedule will effect a greater revolution in the ordinary business of barristers, attorneys and solicitors, than will be accomplished by the Bill itself."

familiar with them before they were set into operation. Accordingly, on November 25, Lord Selborne appointed a committee of three expert draftsmen to carry out in detail the principles of his schedule,¹⁴ and placed them under the supervision of a committee of judges, at whose head he put his Master of the Rolls, the great Jessel.¹⁵

But before these draftsmen had gone far in their labors, another turn came in the political wheel, in February, 1874, when the Conservatives came back into office and Disraeli once more took the helm. Lord Selborne was displaced by Lord Cairns, who had ideas about the new Supreme Court that had not found place in his Liberal predecessor's arrangement. In July, 1874, he had Parliament pass an Act postponing the operation of Lord Selborne's Act for another year, so he might have time to work out his plans. This they were not at all unwilling to do, as the promised rules for the previous Act had been slow in making their appearance. Not

¹⁴ The three he selected were H. Cadman Jones, who, with Josiah W. Smith, Q. C., had drawn up the Consolidated General Orders of the Court of Chancery of 1860; Arthur Wilson, the tutor of Common Law at the Inner Temple who later published the commentaries on the Acts and Rules known as "Wilson's Judicature Acts," which took the place of "Day's Common Law Procedure Acts" and "Morgan's Orders in Chancery" as the practitioner's guide, philosopher and friend; and Dr. Tristram, the noted authority on practice in probate, admiralty and divorce courts of ecclesiastical lineage. Wilson later became a member of the Judicial Committee of the Privy Council, after a judicial career in India.

¹⁵ The other judges on the committee were the Lord Chancellor (Lord Selborne), the three Common Law Chiefs — Sir Alexander Cockburn, Sir John Duke Coleridge and Sir Fitzroy Kelly, Lord Justice Mellish, Vice-Chancellor Hall, Baron Bramwell, Mr. Justice Lush, Mr. Justice Brett, Sir James Hannen and Sir Robert Phillimore. Some of these were among the signers to the Judicature Commission's First Report. But for the untimely death of Mr. Justice Willes in October, 1872, who was then the best living authority on practice and procedure, he would undoubtedly have been placed in charge of the work.

until June 1, 1874, had the draftsmen submitted their completed rules to the committee of judges, and up to July the judges had not yet finished considering them.¹⁶ Only in the first week of August, 1874, was the final text of the rules for the 1873 Act laid before Parliament. By that time the operation of the Act had already been postponed to November, 1875, and Lord Cairns was busy on a new bill with which he intended to modify certain portions of the work Lord Selborne had done.¹⁷

In February, 1875, the new bill was introduced, and by August 11 it had received the Royal Assent.¹⁸ Like the Act of 1873, it carried with it a schedule of rules, but this time the schedule was more than a skeleton. It was the full text of the rules approved by the judges

¹⁶ The Rules were prepared by the draftsmen in three separate batches, and as each batch was completed it was laid before the judges, and copies were circulated by them among such official and representative persons as they thought desirable, and the whole subjected to the committee's revision.

¹⁷ Not in any spirit of partisanship, for Cairns, like his predecessor, was no party figurehead. Soon after he first accepted a peerage at the hands of Lord Derby in 1867, he voted against his party in the Lords on an important measure affecting an extension of the Parliamentary franchise. It was this willingness to co-operate with his political opponent that led him to retain the three draftsmen Lord Selborne had appointed, rather than break into their collaboration after three months of work together.

¹⁸ The principal changes it made in the Act of 1873 were with regard to the final court of appeal. Lord Selborne's Act had made the Supreme Court the highest court in England, cutting off the old right of appeal to the House of Lords. But this proved unsatisfactory on further inspection, as the Act did not affect Ireland and Scotland, appeals from which could go, as before, to the House of Lords—a right of which the English would hardly deprive themselves with equanimity while reserving it to the other kingdoms in the Union. Rather than set about remodeling the entire judicial systems of these countries, Lord Cairns restored the right of appeal to the House of Lords, in English cases.

under the Schedule of 1873, into which had been consolidated the schedule of 1873 itself and a few changes rendered necessary by the text of the principal Act. On November 1 practice in the new court began under the new directions, and the transformation was complete.

CHAPTER V.

THE SCHEDULE OF 1875: ITS CONTENTS.

The Schedule of 1875 does not purport to be a complete code of procedure. Its framers had in view certain specific ends for which the schedule was added to the Act, and it was not intended to do more than accomplish them. In the first place, it was desired to wipe out the many differences which had made the procedures of the various old courts as strange to each other as those of foreign countries; in the second, there were to be added to the new uniform procedure certain definite facilities strongly favored by the Judicature Commissioners in their first report. These were the limits within which the new rules were to operate. Outside them, the old procedure was to remain, as the act expressly required.¹

A definite body of raw materials, out of which they should work up their composition, was thus placed in the hands of the draftsmen who were charged with the duty of preparing the rules. They had before them the practice of the common law courts, as directed in the Common Law Procedure Acts and the Rules of Court made under them²; on the equity side there were the Chancery Practice Amendment Acts and the Consolidated General Orders of 1860³; there were also concrete sets of rules in the courts of probate and admiralty.⁴ Without actually codifying the several thousand sections of adjective law before them, they selected such of them as would fit properly into the new scheme, and

¹ § 21.

² Collected in Day: Common Law Procedure Acts.

³ Annotated in Morgan: Chancery Forms and Orders.

⁴ The Admiralty Rules of 1859 and the Probate Rules of 1862. The new Rules were not to affect divorce proceedings.

rearranged them according to what, in the conduct of an action, would be as nearly as possible chronological sequence. To these sections which were repeated *verbatim* out of the old acts and rules they added another lot of old sections in which slight alterations were necessary, either in the substance or in the form of expression. Then were added the sections containing the entirely new matter they were instructed to include. The whole amounted to four hundred' and fifty-six rules, which were divided up into sixty-three orders, each dealing with one general subject and containing from one to thirty-four rules.⁵ Of these nearly a half are repeated from former statutes or regulations, *ipsissimis verbis* or with slight alteration.⁶ The great virtue of the rules thus formulated was that they would apply to all divisions of the new court. An old common law rule, repeated in the schedule, would apply not only to an action proceeding in the Queen's Bench Division of the High Court, but equally to an action in the Chancery Division if the same question of practice arose. In some instances the repeated rules applied principally to business which would remain, as it was before, in the common law or the equity side of the court, but frequently conflicting procedural methods were smoothed into uniformity by merely adopting the old rule out of one practice or the other.⁷ The net result was that the schedule completed the so-called fusion of law and equity by exchanging in their procedures some of the rigor of one for some of the freedom of the other, with the least possible amount of anything which might be a complete innovation to both.⁸

⁵ This was the form of the old Orders in Chancery.

⁶ About two hundred and ten Rules.

⁷ For instance, in the Rules on Execution.

⁸ Commending this attitude, the ever-watchful Solicitors' Journal said (19 Sol. J. 252, February 6, 1875): "The Act itself makes

A brief survey of the sixty-three orders in the schedule will illustrate this clearly. They are here divided into five groups, for convenience of treatment.

The first fifteen orders deal with the preliminary steps in an action, carrying the matter to the point where appearance has been entered or, for want of one, the plaintiff has taken his judgment. Their general effect is to make the common law procedure apply to the opening of hostilities in all divisions of the High Court.

The opening rules⁹ throw every litigation, whether at common law, in equity, probate, or admiralty, into the form of an "action," begun by writ of summons. This marks a great change, especially in equity, admiralty and probate procedure, from which bill, information, cause *in rem*, citation and other picturesque names are thus deleted.¹⁰ A blank form for the writ having been

provisions containing the greatest possible capacity for leaving things pretty much as they are, combined with the greatest possible capacity for ultimately making great alterations. . . . The new Rules seem to proceed upon a similar method. The intention is that the old system shall transmute itself in working into the new, the direction and manner of its change being shaped and guided by the exigencies of the occasion and by practical experience. A procedure cannot, any more than a constitution, be born full grown. . . . Any change must be initiated and worked out by the present practitioners as best it can. The new rules must not fit too tightly at first and in some respects must be left to be shaped by experience. It must be remembered, too, that it is a difficult thing to embody what is very much in the nature of an alteration of the spirit of a procedure in distinct specific rules."

These are sentences that might be profitably read by rule-makers outside of England as well.

⁹ Order I, Rule 1, and Order II, Rule 1.

¹⁰ At this point the subject of an interpleader proceeding, which is not begun by writ of summons, is treated of in Order I, Rule 2. Interpleader applications will be granted in any case where either the old equity or law courts would have granted them, after service of a writ and before defence pleaded.

given in the appendix,¹¹ four orders¹² go on to describe what information must be given in it as to the identity of the parties and of their causes of action. The substance of the latter is to be contained in an "indorsement" on the back of the writ — a short "statement of the nature of the claim made, or of the relief or remedy required in the action." This rule completes the gradual disappearance from the pleader's armory of those curiously wrought weapons devised by the early clerks in chancery, out of whose ingenuity sprang the whole romance of *assumpsit* and the other descendants of Westminster the Second.¹³ But, though the identity of all the old writs is now merged into the single form, four distinct classes of indorsements are provided for, each to be followed by a different line of attack. Unliquidated claims are to be briefly described in a "general indorsement," leaving more detailed information to be supplied in a statement of claim delivered after appearance; liquidated claims may be "specially indorsed," in which case no further statement of claim need be made; the special indorsement peculiar to actions founded on negotiable instruments, instituted

¹¹ Appendix A, Part I.

¹² Orders II, III, IV and VII.

¹³ The Uniformity of Process Act, 1832, introduced a uniform writ of summons for all personal actions, which stated in an indorsement the nature of the action, *e. g.*, debt, trespass, *etc.* The Real Property Limitation Act, 1833, abolished all but three of the old real and mixed actions. The Common Law Procedure Act, 1852, reduced all writs of summons to three: one for use in all personal actions, making no mention at all of the cause of action, containing merely a summons to appear; another in replevin; and a third in ejectment, which made uniform the writ in the remaining real actions. The 1875 Rule assimilated replevin and ejectment to personal actions, making universal a single form of writ and restoring the indorsement to inform the defendant what was claimed.

in 1855,¹⁴ is retained; and in cases where an accounting must precede the determination of rights, the plaintiff must ask for it on his writ so that an order for an account may issue at once upon the defendant's appearance.¹⁵ Of these four, the general indorsement was quite new; the others had been in use before, either in equity or at law.¹⁶ Three orders¹⁷ regulate the formal issue of the writ from the court office, the issue of concurrent writs and the renewal of writs after a lapse of time.¹⁸

Three orders are then devoted to the requirements for proper service. Apart from a few new provisions as to service upon defendants under disability¹⁹ they are

¹⁴ Under the Summary Procedure on Bills of Exchange Act, 1855. If the plaintiff sued on a promissory note or bill of exchange, he would indorse on his writ a copy of the instrument and allow credit for any payments made. The defendant would then not be allowed even to appear to the writ unless he showed, on affidavit, that he had a defence on the merits.

¹⁵ Such order will issue of course unless the defendant shows there is some preliminary question to be tried. Order XV, Rule 1. This merely extended the former chancery practice to the common law side, although the advantage of a simple indorsement on a writ over the old bill in equity is obvious. This departure was recommended by the Judicature Commissioners.

¹⁶ The "special indorsement" of liquidated claims, allowed by Order III, Rule 6, is a slight extension of §25 of the Common Law Procedure Act, 1852. Besides doing away with the necessity for a statement of claim, it had the virtue of allowing the plaintiff to obtain final judgment at once if the defendant failed to appear. When the writ was "generally" indorsed he had to have his damages assessed on writ of inquiry before he could get final judgment.

¹⁷ Orders V, VI and VIII.

¹⁸ The Rules as to concurrent writs and renewal of writs are copied from §§9, 11, 13 and 22 of the Common Law Procedure Act, 1852, with the life of the writ put at twelve months instead of six. A "concurrent" writ is a duplicate to facilitate service where there are several defendants.

¹⁹ Order IX, Rules 3 to 6 cover service on a wife, an infant, a lunatic and a partnership.

principally an adaptation of the existing rules.²⁰ The two departments from which inconsistencies are removed are substituted service²¹ and service out of the jurisdiction. The latter phrase comes as a shock to American ideas of jurisdiction for service, but there is a list of cases given in the order²² in which it is permitted, and there are rules in which the necessary steps are explained. Appearance is the next subject mentioned; most of the rules in the two orders devoted to it repeat parts of the old rules with some slight changes.²³ Finally, an entirely

²⁰ The following old rules are repeated, in whole or in part, in Orders IX, X and XI: §§15, 16, 17, 18, 19 and 170 of the Common Law Procedure Act, 1852; Rule 3 of Hilary Term, 1853; Chancery Order X, Rule 7; Rule 107 of the Admiralty Rules, 1859; and Rules 18 and 19 of the Probate Rules, 1862.

²¹ In England service is effected by the parties, not by a court officer. "Personal service" is handing the defendant a copy of the writ and showing him the original if he wishes to see it. "Substituted service" is usually by mail and is ordered by the court only when efforts to make personal service within the jurisdiction are unavailing. The Pennsylvania method of allowing service upon a member of the defendant's family or household is not in use. Service by advertisement is ordered by the court only when "there is some reason for believing that the advertisement may come to the knowledge of the defendant." Memorandum of the King's Bench Masters. See Chitty: King's Bench Forms, Part III, c. 1, s. III, note f.

²² Order XI, Rule 1. Previously, under Chancery Order X, Rule 7, the Court of Chancery had discretionary power to order service out of the jurisdiction in any case whatsoever. The Rules of 1875 adopted the limitations of the common law rules, §§18 and 19 of the Common Law Procedure Act, 1852, slightly enlarged. This power to effect service out of the jurisdiction counterbalances, to some extent, the lack of anything like foreign attachment proceedings in the High Court.

²³ The following old Rules are repeated, in whole or in part, in Orders XII and XIII: §§27, 28, 29, 30, 33, 172, 173, 174, 177 of the Common Law Procedure Act, 1852; Rules 2, 3, 113 of Hilary Term, 1853. The chief innovations are that partners, though sued in their firm name (as allowed by Order XVI, Rule 10) must appear personally; and that a plaintiff need not file a statement of claim if a

new order, the famous Order XIV, extends and makes more elastic the recovery of summary judgment in any case where, after appearing to a writ specially indorsed (therefore, on a liquidated claim) the defendant fails to convince the court, on affidavit, that his defence on the merits is sufficient to warrant his being given leave to defend.²⁴

If the 1875 Schedule were divided up into chapters, the next fifteen orders might be grouped together under the heading of Parties and Pleadings. These are the most vital in the schedule, as they introduce into actions at law equitable notions about the joinder of parties and of causes of action, and impose upon the procedure in equity in that connection some of the exactitude and brevity which has always been the redeeming virtue of pleading at common law. Later amendments have made some alterations in these fifteen orders, but they still remain²⁵ the heart of the whole body of English legislation on procedural reform.²⁶

defendant fails to appear to a writ "generally" indorsed, but may sign interlocutory judgment and proceed to assess his damages by writ of inquiry.

²⁴ This summary judgment was previously possible only under the Act of 1855 mentioned in note 14, *supra*. Order XIV extends it to all claims specially indorsed and allows the judgment to be for part or whole of the claim, and against less than all the defendants. In this respect, it corresponds somewhat to the Pennsylvania judgment for want of a sufficient affidavit of defence. One of its virtues is in the affidavit which is a prerequisite to leave to defend, as ordinary pleadings are not under oath. The leave to defend may be either unconditional or subject to terms such as payment in of all or part of the amount in dispute, or immediate trial by a judge without a jury. This procedure was another of the specific recommendations of the Judicature Commissioners.

²⁵ Together with Order XXXVI, relating to modes of trial.

²⁶ In the main they carry out recommendations made by the Judicature Commissioners.

Three of them relate to parties.²⁷ They allow all persons to be joined in whom or against whom "the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."²⁸ Parties may be so brought in who are interested in only a part, if not the whole, of the cause of action; they may be freely brought in or struck out after the action has commenced, even as late as the trial itself, by any party to the writ, and the greatest liberality is allowed as to substitution. Equally elastic are the judgments to be pronounced; they may affect some or all of the parties, and all or part of the property in dispute. These rules enlarge greatly the old common law powers²⁹ and add to the chancery powers that of dealing with the mutual rights of particular persons singly as well as in the whole controversy. Two innovations worthy of especial note are the right given a plaintiff to join two or more defendants in the alternative if he "is in doubt as to the person from whom he is entitled to redress,"³⁰ and the "third party procedure" by which a defendant may bring in as a third party primarily liable any person from whom he "is, or claims to be, entitled to contribution or indemnity, or any other remedy or relief" in connection with the subject matter of the action.³¹ Both of these have worked wonders in avoiding

²⁷ Orders XVI, XVIII and L.

²⁸ Order XVI, Rules 1 and 3.

²⁹ §§19 to 21 of the Common Law Procedure Act, 1860, provided that all persons who were "supposed to have a right" could join as plaintiffs, and be struck out if proper, but even that was restricted within the limits of joint contractual rights. As to substitution, the old common law courts could add or strike out parties, but they would never substitute.

³⁰ Order XVI, Rule 6. This right is, of course, subject to an obligation on the plaintiff to pay the costs of any person who is cleared of liability. "Costs," it should be remembered, are a real compensation in England, as they include counsel fees.

³¹ Order XVI, Rules 17 to 21, carrying out § 24 (3) of the Judicature Act, 1873. This was another of the Commission's recommendations.

multiplicity of actions and expenditure. In the rules as to capacity of parties a striking novelty is the provision that partnerships may sue and be sued in their firm names.³²

A single order suffices to proclaim the new creed as to joinder of causes of action. As with every new religion, its foundation is in its new point of view. The test is no longer the form of the writ or the nature of the right involved, but the purely empirical one of the convenient trial of the issues to be raised. The rule allows all causes of action to be united in the same claim except such as "cannot be conveniently tried or disposed of together."³³ Undoubtedly this pronouncement has been equally as potent as the one unifying all the writs of summons, in breaking down the walls between the forms of action. It is also specifically provided in the order that parties may join their own several claims with actions begun on a joint obligation, and that they may join individual claims with demands sued on in a representative capacity.³⁴ Subject to the risk of having separate trials ordered where causes are inconveniently joined, this allows parties an almost unlimited latitude they never before enjoyed.³⁵

³² Order XVI, Rule 10. Although partners so sued must appear in person, Order XII, Rule 12, and partners so suing must, on demand, disclose their individual names, Order VII, Rule 2.

The other Rules on capacity (Orders XVIII and L) are principally an adaptation of existing rules, under §§135 to 142 of the Common Law Procedure Act, 1852, § 92 of the Common Law Procedure Act, 1854, §§ 42 and 52 of the 15 & 16 Vict., c. 86, and Chancery Order XXXII, Rule 1.

³³ Order XVII, Rule 1.

³⁴ Except in the case of a trustee in bankruptcy, Order XVII, Rule 3.

³⁵ § 41 of the Common Law Procedure Act, 1852, had allowed the joinder of all personal claims between the same parties suing in the same right, but this extended the liberty to include actions to recover

Having declared the new doctrine of parties and causes, the rest of the orders in this group cover the practical subject of pleadings. Order XIX, entitled Pleading Generally, has become the English pleader's *vademecum*; every student at the Inns is enjoined to commit its principal rules to memory. Beginning with the general admonition that "statements shall be as brief as the nature of the case will admit," they go on to stipulate that "every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved," and to describe particularly certain matters (like malice, fraud, notice, *etc.*) which may be briefly alleged as facts, and certain other matters (like denials of material allegations) to support which the pleading must be full. Sufficient description is given of the forms required, and this is supplemented by the presence of a number of specimen pleadings inserted in the Appendix. The former common law rules as to amendment and the pleading of new matter arising after action brought were generous, and these are repeated.³⁶

Then the successive pleadings in an action are taken up *seriatim*, in separate orders. First is the Statement of Claim. Its form and contents are, it is true, determined

property, and actions based on any right at all. The check of convenience of trial was a much easier one than the old equity test of multifariousness. It was adopted from the Act of 1852.

³⁶ Order XX, as to pleading new matter, copies §§ 68 and 69 of the Common Law Procedure Act, 1852, and Rules 22 and 23 of Trinity Term, 1853. Order XXVII, on amendment of writ and pleadings, amplifies § 222 of the Common Law Procedure Act, 1852, § 96 of the Common Law Procedure Act, 1854, § 36 of the Common Law Procedure Act, 1860, Chancery Order IX, Rules 17 and 24, and Chancery Order XXXIII, Rule 11, by providing that any pleading may be amended at any time: once without obtaining leave, and again after that with leave of the court — subject to the other party's right to object.

by Order XIX, but Order XX fixes the time for its delivery³⁷ in various actions, allows the defendant to waive a statement of claim,³⁸ and provides that a special indorsement shall be equivalent to a statement of claim.³⁹ The defendant's response to this document is called his Defence, the time and occasion for which are next prescribed.⁴⁰ Here, however, further directions than the general rules of Order XIX were necessary, to describe the newly enlarged privilege of counterclaim,⁴¹ whereby a defendant could set up in his defence any right or claim on which he could have founded a separate action against the plaintiff. Such a counterclaim is to be treated in all respects as a cross-action. If there is no counterclaim pleaded, there would, in an ordinary case, be no further pleadings, but where a counterclaim is put in the plaintiff is entitled to deliver a Reply,⁴² which corresponds exactly to a defence to a statement of claim. Any pleadings subsequent to reply may be delivered only by leave of the court.⁴³ To solidify this structure of pleadings, the common law demurrer is retained; it is provided that any party may demur to any part of any pleading.⁴⁴

³⁷ Pleadings are merely delivered to each other by the parties. They are not filed of record until judgment is entered, when a copy of all the pleadings is filed in the Central Office.

³⁸ This provision was later changed, as it was found useless.

³⁹ See notes 11 and 24, *supra*.

⁴⁰ Order XXII unifies the widely divergent practices of the Common Law courts under § 63 of the Common Law Procedure Act, 1852, the Court of Chancery under Chancery Order XXXVII, Rule 4, the Court of Admiralty under Rule 68 and the Court of Probate under Rule 38.

⁴¹ Created by Order XIX, Rule 3, under § 24 (3) of the Judicature Act, 1873.

⁴² Order XXIV.

⁴³ The rules as to delivery of pleadings with or without leave have been greatly altered since 1875.

⁴⁴ Order XXVIII.

But demurrers were soon abandoned altogether by the rule-makers⁴⁵ for the more intelligible "objection in point of law."

Two orders describe the procedure to be followed if either side does not wish to go on with its case. A plaintiff may discontinue, but only by leave of the court, upon proper terms as to his opponent's costs and as to any other action being brought.⁴⁶ This unifies previous divergencies and is "one of several rules which materially curtail the plaintiff's freedom of control over the conduct of the cause, and leave him much less fully *dominus litis* than he was before."⁴⁷ The other covers default of pleading.⁴⁸ It penalizes a failure to defend, by judgment final or interlocutory according to the nature of the claim, against some or all of the defendants, and also prescribes the penalties for default at any subsequent stage in the proceedings.

Now follows a group of orders dealing with interlocutory matters which in England are roughly described as Chamber Work, and are under the supervision of the masters, who have most of the powers of a judge at chambers. Except in one regard,⁴⁹ they repeat substantially the existing practice of the common law courts, laying it down for the future guidance of all divisions of the High Court, with some improvements in detail. Of the thirteen orders in this group, three as to payment

⁴⁵ In 1883, when the whole body of Rules was revised.

⁴⁶ Order XXIII.

⁴⁷ Wilson: *Judicature Acts* (1st ed., London, 1875), p. 221. Another of importance is Order XLI, Rule 6, for which see note 70, *infra*. Another is Order XXXVI, Rule 4, which allows the defendant to enter the action for trial if the plaintiff fails to do so within the appointed time.

⁴⁸ Order XXIX is built up out of the common law rules in §§ 93 and 94 of the Common Law Procedure Act, 1852.

⁴⁹ The newly extended powers of appointing receivers and granting injunctions on the common law side of the court.

into court, admissions on the record, and the putting of a case stated show the least deviation from the previous practice.⁵⁰ Four orders reflect the equitable spirit implanted into all divisions of the court; one⁵¹ confers upon the court power to enlarge, for good cause, the time appointed in the rules for the doing of any act, before or after it has expired; another⁵² declares that non-compliance with any of the rules shall not render a proceeding void, but merely subject to be set aside or amended on proper terms; a third allows the court to make all orders necessary for the preservation of rights or property *pendente lite*, or the bringing into court of materials necessary to assist the court in determining the issues before it,⁵³ and the fourth allows the parties, or the court of its own motion, to consolidate separate actions which can be conveniently tried together.⁵⁴ Three more

⁵⁰ Order XXX, on payment into court, reproduces, modified, §§ 70, 72 and 73 of the Common Law Procedure Act, 1852 and Rule 11 of Hilary Term, 1853.

Order XXXII, on admissions, is nearly identical with §§ 117 and 118 of the Common Law Procedure Act, 1852, Rule 29 of Hilary Term, 1853, and Chancery Rule 7 under the 21 & 22 Vict., c. 27.

Order XXXIV, on case stated, somewhat enlarges the powers exercised by the court under §§ 46, 47, 179 of the Common Law Procedure Act, 1852, and Chancery Rules 8 and 14 under the 13 & 14 Vict., c. 35.

⁵¹ Order LVII, Rule 6 is one of the most frequently invoked of all the Rules.

⁵² Order LIX. Both these are entirely new provisions.

⁵³ Order LII. The court is empowered to order payment in of the amount, or surrender of custody of property, in dispute; the sale of perishable goods; the appointment of a receiver or the issue of an injunction; the inspection of property; the taking of samples; the making of observations or experiments; and if property is withheld not to dispute title, but to enforce a lien, the surrender of the property upon payment into court of the amount of the lien.

⁵⁴ Order LI. This is frequently applied in accident cases, where a number of claims arise out of the same act of negligence.

orders⁵⁵ describe, in some detail, the procedure to be followed in the making of interlocutory applications — whether they should be by motion, by summons, or by rule to show cause, and whether they should be made in open court or in chambers, or in the district registry. One of these repeats the common law rules as to practice before the masters and slightly enlarges their jurisdiction.⁵⁶ The official regulations as to the size and style of paper and printing to be used form the subject of a separate order.⁵⁷

But the most important orders in the interlocutory group are two relating to methods of discovery. The old chancery procedure had always provided a party with ample facilities for obtaining, before the trial, a knowledge of the facts and documents on which his opponent proposed to rely, though by methods provokingly cumbersome.⁵⁸ The common law courts, too, had a limited power to order discovery, conferred upon them by the Common Law Procedure Acts,⁵⁹ which had been found exceedingly useful in eliminating unnecessary issues from the trial. To obtain the benefit of the extended principles of the Court of Chancery, and combine with them the simplicity of the common law methods,

⁵⁵ Orders LIII, LIV and XXXV. The last gives full details as to the work to be done by the District Registries created under the Judicature Act of 1873.

⁵⁶ Order LIV, repeating with a few additions the rule of Michaelmas Term, 1867, made under the 30 & 31 Vict., c. 68, which created the office of Master in the Common Law courts. In the Chancery Division the "Masters" are the Chief Clerks to the judges, appointed under the 15 & 16 Vict., c. 80, who, in 1897, obtained from the Lord Chancellor the right to be called Masters.

⁵⁷ Order LVI. There are also the regulations as to the printing of pleadings, in the earlier Orders on pleadings.

⁵⁸ Especially roundabout was the old way of administering, through an official examiner, interrogatories which went through the whole Bill like a fine-toothed comb.

⁵⁹ §§50, 51, 52, 53 and 54 of the Common Law Procedure Act, 1854.

the framers of Order XXXI devised a combination of the two which would enable any party to ascertain with precision just what he was expected to prove or refute at the trial, and no more. Briefly, the new system provides that any party may, after the first pleadings have been exchanged, deliver to his opponent, without leave, a set of interrogatories requiring sworn answers, and obtain, upon formal request, a sworn list of all relevant documents in his opponent's possession or power. This is supplemented by proper protection to the answering party, which permits him to refuse to answer improper questions and to refuse inspection of any documents for which he can properly claim privilege. The order gives complete details as to the times and methods for requesting this discovery and for enforcing, by penalties, the right to it when refused. Minor defects in the previous practice, are, incidentally, repaired.⁶⁰ A further order⁶¹ empowers the court, of its own motion, to direct the making of any inquiries or the taking of any accounts it considers necessary to a proper determination of the rights in controversy.

The first three groups of orders have carried the dispute from the marketplace to the door of the courtroom. Next in sequence are eleven orders that might be grouped together as the rules on Trial and Judgment. Previous orders made it possible to unite all parties and causes of action in a single proceeding; these give the court power to separate issues not fit to be tried together and to pronounce judgment from time to time on parts

⁶⁰ For instance, Order XXXI, Rule 23, permits a party to use only one, or less than all, of the answers he has received to interrogatories. The former common law rule forced him to put in all the answers or none, at the trial, so that frequently he could not safely rely on one answer (which might serve to eliminate a minor issue) for fear of damaging his case by showing the others.

⁶¹ Order XXXIII, based on § 66 of the Judicature Act, 1873.

as well as the whole of the controversy, on litigants singly as well as in groups. In short, they carry out the principle that the convenience of trial is hereafter to be the test of the limits of action, and make that principle widely beneficial by striking improvements in the instruments of trial and judgment.⁶²

To begin with, Order XXXVI abolishes *venue* and creates a variety of forms of trial. Under it the trial of an action, regardless of its place of origin, may be held in any county where a branch of the court will sit. Before, all trials at law had been before a jury⁶³; the new rules make it incumbent on one side or the other to ask explicitly either for a jury or a non-jury trial, although no limitation is set upon the right to have a jury. They also offer the choice of trial before a judge assisted by technical experts (assessors), or before an official or special referee sitting with or without assessors.⁶⁴ This is coupled with a power in the court to order that some issues in a cause be tried sooner, and some by a different form of trial, than others, so that the court is entirely free to deal with however complicated a controversy in a logical and efficient way by splitting up the issues and having each one tried by the most competent tribunal. It is further aided by the right to postpone or adjourn a trial whenever necessary.⁶⁵ As to

⁶² These innovations were among those most strongly recommended by the Judicature Commissioners in their First Report, and some of them were put into the Judicature Act itself.

⁶³ §1 of the Common Law Procedure Act, 1854, allowed the trial of issues of fact by a judge without a jury if both parties consented in writing, but such consent was not often given.

⁶⁴ The referees were created in §§ 56 to 59 of the Judicature Act, 1873, with the hope of winning back to the law courts much of the business that was going to arbitration.

⁶⁵ Order XXXVI, Rule 24. This rule is copied from §19 of the Common Law Procedure Act, 1854.

the conduct of the trial itself, two orders⁶⁶ prescribe the form in which evidence shall be received and affidavits made, and they allow the court in any case, "for sufficient reason," to order that any particular facts may be proved or testimony taken by affidavit.

Coming now to the flexibility of judgments, Order XL allows any party, at any stage of an action, to move for any relief he appears entitled to by admissions in the pleadings, or, if some of the issues have been tried and the rest appear to him unimportant, to move for final judgment. The judge, too, has discretion, at the conclusion of a trial, either to reserve judgment, order it to be entered at once, or order it to be set down for argument before him on points of law.⁶⁷ Finally, even if judgment has been entered, an objecting party may move to have it set aside and another judgment entered after argument, without the necessity for a new trial. On such a motion, as well as on a motion for a new trial,⁶⁸ the court is privileged to order the retrial of separate issues, less than all, and to order the making of any inquiries or taking of any accounts that seem necessary. New trials, however, are sternly discouraged by the rules, which forbid the granting of one on the ground of misdirection, or of the improper admission or rejection of evidence, unless some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.⁶⁹ Another old practice broken up is the suffering of a voluntary nonsuit, which is made equivalent to a judgment on the merits (unless otherwise ordered by the court), thus barring another action for the same cause.⁷⁰ The com-

⁶⁶ Orders XXXVII and XXXVIII.

⁶⁷ Order XXXVI, Rule 22.

⁶⁸ Order XXXIX, Rule 4.

⁶⁹ Order XXXIX, Rule 3. No such provision was made in the previous common law rules.

⁷⁰ Order XLI, Rule 6.

plete power given the court over costs, in Order LV, enables it to exercise a most useful control over the proper conduct of an action at all points; the practitioner has ever before him the risk of being ordered to pay his opponent's costs for unnecessary or unfair obstacles raised. This group concludes with a few miscellaneous orders as to the duties of officers of the court and the times of sittings and working hours of the courts and officers.⁷¹

Last group of all "that ends this strange eventful history" is one of nine orders dealing with Appeal and Execution. The order on appeal is necessarily new, as the Court of Appeal was itself a new tribunal, supplanting the former Exchequer Chamber and other appellate bodies; but the eight which cover execution are almost direct transcriptions from the previous rules at common law and in equity. Their repetition in these rules gives the equity side of the court the advantages of the common law writs for enforcing its decrees, and adds to the legal powers of execution the equity methods of orders *in personam*.

The salient points of the appeal order⁷² are that bills of exceptions and proceedings in error are abolished, that all appeals are to be by "notice of motion" stating the ground of the appeal,⁷³ and that the Court of Appeal is authorized to exercise all the powers of the court of first instance as to considering the evidence and entering or altering final judgment. The order also states the times within which appeals from various orders must be perfected and lays down directions for the whole procedure.

⁷¹ Orders LX and LXI. Orders LXII and LXIII, which may be mentioned here, state that these Rules do not apply to divorce, crown, revenue or criminal proceedings, and give the interpretation of technical terms used in the Rules.

⁷² Order LVIII.

⁷³ Exceptions and writs of error are abolished.

The execution orders are, to a large extent, *verbatim* repetitions of sections of the Common Law Procedure Acts, the Chancery Orders, and the Common Law Rules. They provide for the usual writs — *feri facias*, *elegit*,⁷⁴ sequestration,⁷⁵ possession,⁷⁶ and delivery⁷⁷ — and retain the special procedure for attachment of the person,⁷⁸ attachment of debts,⁷⁹ and charging orders on shares of stock,⁸⁰ in use in one or other of the old courts. An introductory order codifies the former rules as to the practice on issuing writs of execution, and applies them to all divisions of the new court.⁸¹ There seems to be no record of why the diversity in writs of execution was not planed off together with the differences in writs of summons. No mention is made of the subject in the Report of the Judicature Commissioners, and nothing is said about it in either of the Judicature Acts. It must be presumed there was no active dissatisfaction with the

⁷⁴ Order XLIII covers these two.

⁷⁵ Order XLVII. This is taken from Chancery Order XXIX, Rule 3.

⁷⁶ Order XLVIII, for recovery of possession of land.

⁷⁷ Order XLIX, for recovery of possession of chattels, since § 78 of the Common Law Procedure Act, 1854.

⁷⁸ Order XLIV. Leave of the court is made a prerequisite to the issue of the writ.

⁷⁹ Order XLV applies the common law rules to all Divisions of the High Court by repeating, as 10 Rules, §§ 60 to 67 of the Common Law Procedure Act, 1854, and §§ 29 and 30 of the Common Law Procedure Act, 1860.

⁸⁰ Order XLVI extends to all Divisions the former Chancery practice instituted under 1 & 2 Vict., c. 110, §§ 14 and 15, 3 & 4 Vict., c. 82, § 1, and 5 Vict., c. 5, by which shares of stock standing in the books of any company in the name of the judgment debtor could be charged with the debt. Their transfer would then be impossible before payment of the debt.

⁸¹ Order XLII makes a few additions to §§ 120, 123, 124, 125, 128, 129 to 134 of the Common Law Procedure Act, 1852, Rules 71, 73, 76 and 57 of Hilary Term, 1853, and Chancery Order XXIX, Rule 2.

methods of execution in vogue, so the procedure was left practically untouched; the authors of the Acts and Rules aimed not at a theoretical perfection of unity, but at the practical correction of existing abuses.

This concludes the survey of the Schedule of 1875. As has been pointed out, it accomplished great reforms, especially in the matters of summons, parties, pleadings and trial, but it was equally tenacious of all that promised well in the existing procedure and let much of it stand, unmentioned.⁸² The most remarkable feature of its contents is the large number of what previously were firm statutory mandates which now appear as adaptable rules of court,⁸³ warmed into life by the touch of judicial discretion. It went into operation with the good will of the profession generally, who were heartily sick of the suspense of the preceding few years, and cleared the ground for the even greater changes which forty years of active husbandry have brought about.⁸⁴

⁸² Numerous points of detail, such as the whole subject of costs. The brief rule on costs merely gives the court complete power over their distribution among the parties. Most of the details of chancery, probate and divorce practice were left untouched. The chancery practice was brought in in 1883. But the probate practice is still largely regulated by the Probate Rules of 1862, made under the Court of Probate Act, 1857 (20 & 21 Vict., c. 77); and divorce practice by the Divorce Rules of 1865, made under the Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85). Criminal procedure has never been included and is not codified. Procedure on the Crown and Revenue sides of the King's Bench Division was only partly included in 1883, and separate sets of Rules have been promulgated for it. See Crown Office Rules, 1906.

⁸³ Ninety Rules out of the four hundred and fifty-six.

⁸⁴ Since the revision of 1883 the annual crop of amendments has averaged twelve in number.

CHAPTER VI.

THE REVISION OF 1883

The decade after 1873 was one of glorious uncertainty in the practice of the law. The old court-rooms and their offices looked familiar enough,¹ but everything in them was changed and lawyers trod the mazes of the new procedure warily. No one knew just how far the Judicature Acts were meant to go in the grand scheme of "fusing" law and equity, or what their results would be. Looking back now upon forty years of the new dispensation, it is easy enough to see that the substances of law and equity flourish apart, no matter how their procedures are combined,² but to their contemporaries the first Judicature Acts seemed to demolish all the old landmarks that bounded the fields of each. The common law pleader anxiously studied up the rambling narratives of the equity draftsman, to learn how he could forget the highly precise and technical art in which he had been bred, and his brother of the chancery bar, with equal trepidation, bade farewell to all those prolix fictions which

¹ The Common Law Courts continued to sit at Westminster and the Court of Chancery at Lincoln's Inn until the opening of the new Royal Courts of Justice at Temple Bar on December 4, 1882.

² Professor Vinogradoff, in his *Common-Sense in Law* (London, 1913, p. 219), points out that there is "a fundamental difference of methods. In one system the centre of gravity lies in the formulated rule, and therefore there is a strong tendency to sacrifice the particular to the general, justice to certainty; while in the other there is a more direct quest after right and a wide discretionary power on the part of the judge to draw on his own notions of what is fair and just." And the English experience enables him to say truly (p. 232) that equity "does not disappear when special tribunals of equity are merged by a comprehensive reform of the judicature."

had made his bills in equity so formidable to the naked eye.³ The outcome "turned out to be the introduction of a mode of pleading so confused and inartistic as to be in many instances only a source of embarrassment and expense."⁴

Then, to make sure he was committing no error, every practitioner took advantage of every privilege allowed him in the Rules in the conduct of an action. He asked for all the discovery and all the amendments and extensions the Rules could possibly warrant⁵; where the Rules were not precisely worded, he asked for it just to see what would happen, and there were innumerable places where the terms of the Rules were broadly general. In any case, he would appeal from every adverse decision in the course of the proceedings, to have the benefit of judicial interpretation of doubtful passages in the Rules at his opponent's expense. Appeals accordingly increased enormously in number.⁶ Nor was the distracted

³ "It was a Bill of this kind," says Mr. Birrell, in *A Century of Law Reform* (London, 1901, p. 182), "which, when it was served upon John Wesley in 1745, drew from him the following observations: 'I called on the solicitor I had employed in the suit lately commenced against me in Chancery, and here I first saw that foul monster, a Chancery Bill. A scroll it was in forty-two pages in large folio to tell a story which needed not to have taken up forty lines, and stuffed with such stupid, senseless, improbable lies, many of them, too, quite foreign to the question, as I believe would have cost the compiler his life in any Heathen Court either of Greece or Rome, and this is equity in a Christian country!'"

⁴ Lord Justice Bowen, in *2 Law Quarterly Review*, 8 (January, 1886).

⁵ "The Judicature Acts, in perfecting the machinery of litigation, placed within the reach of every litigant a very complete weapon, but one far too elaborate and precise for the necessities of every case. The first result was to increase by something like twenty per cent. the ordinary expenses of a common law action." (Lord Justice Bowen, in *2 Law Quarterly Review*.)

⁶ Sir Frederick Pollock, in his *Expansion of the Common Law* (London, 1904, p. 15), gives the following description of that time:

suitor relieved to learn that frequently his adviser was utterly nonplussed by the presence unrepealed of dozens of old regulations and statutes on subjects so like those covered by the new Rules that only the authority of a court of appeal could determine which was the correct practice to pursue.⁷

To add to the general uncertainty, the Rule Committee began to issue sets of amendments to the Rules, and Parliament turned out a string of statutes that affected nearly every branch of law most used in practice. No less than twelve separate sets of amendments to the Rules were issued between 1875 and 1883,⁸ and much unnecessary inconvenience was caused by the fact that no prompt notice or publication of their issue was given to the profession. Nearly every year saw a fresh Judicature Act which made some change either in the organization of the Supreme Court or in the course and

"Thirty years ago the authors of our Judicature Acts in England, men of the highest eminence, but trained exclusively in the Chancery system, went about to engraft considerable parts of that system on the practice of the Courts of Common Law. What came of their good intentions? Instead of the simplicity and substantial equity which they looked for, the new birth of justice was found to be perplexed practice, vexatious interlocutory proceedings, and multiplication of appeals and costs, so that for several years the latter state of the suitor was worse than the former. Repeated revision of the Rules of Court, and some fresh legislation, was needed before the reconstructed machine would work smoothly."

⁷ Lord Justice Brett is reported to have said (70 Law Times, 127, December 25, 1880), that the Judicature Rules were not carefully drawn with due regard to the practice existing at the time of the passing of the Acts. Most of the old procedural statutes were eventually repealed by the Statute Law Revision Acts of 1879, 1881 and 1883, and the rest were codified into the new Rules of 1883, as will be described *infra*.

⁸ The dates were: December, 1875; February, 1876; June, 1876; December, 1876; May, 1877; June 1877; November, 1878; March, 1879; December, 1879; April, 1880; May, 1880; May, 1883.

disposition of appeals.⁹ But even more important were the many great reforms in substantive law carried out in those historic years, under the leadership of two such tireless and far-seeing statesmen as Lord Selborne and Lord Cairns. Among them were the Married Women's Property Acts of 1874 and 1882,¹⁰ the Bills of Sale Acts of 1878 and 1882,¹¹ the Contingent Remainder and the Mortgage Acts of 1877,¹² the Employers' Liability Act of 1880,¹³ the Conveyancing Act of 1881,¹⁴ the Settled Land Act and the Bills of Exchange Act of 1882,¹⁵ and the Bankruptcy Act of 1883.¹⁶ This flood of enactments, all of the character that touched every busy lawyer in his daily practice, added to the troubles with which he was beset by the puzzles in the new procedure.

Needless to say, the net result of this combination of disturbing elements was that costs mounted up aggressively, and gradually there arose a public outcry

⁹ Some of these were the Appellate Jurisdiction Act, 1876 (39 & 40 Vict., c. 59), the Matrimonial Causes Act, 1878 (41 & 42 Vict., c. 19), the Summary Jurisdiction Act, 1879 (42 & 43 Vict., c. 49), and the Judicature Act, 1881 (44 & 45 Vict., c. 68). With these may be classed the repealing statutes which cleared the air of most of the cloud of old procedure: the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict., c. 59), the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict., c. 68), and the Statute Law Revision Act, 1883 (46 & 47 Vict., c. 49).

¹⁰ 37 & 38 Vict., c. 50, and 45 & 46 Vict., c. 75.

¹¹ 41 & 42 Vict., c. 31, and 45 & 46 Vict., c. 43.

¹² 40 & 41 Vict., c. 33, and c. 34.

¹³ 43 & 44 Vict., c. 42.

¹⁴ 44 & 45 Vict., c. 41.

¹⁵ 45 & 46 Vict., c. 38, and c. 61.

¹⁶ 46 & 47 Vict., c. 52. Other statutes of great practical importance were the Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), the Trade Unions Act, 1876 (39 & 40 Vict., c. 22), the Bankers' Books Evidence Act, 1879 (42 & 43 Vict., c. 11), the Solicitors' Remuneration Act and the Newspaper Libels Act, 1881 (44 & 45 Vict., c. 44 and c. 60), and the Patents Act, 1883 (46 & 47 Vict., c. 57).

against the expense of litigation. The Judicature Acts seemed to be defeating their own ends.¹⁷ In a leading article addressed to the Council of Judges, the Times called upon them to "endeavor to see whether it is not possible to prevent by a few judicious changes in procedure the waste and muddling away of suitors' money that goes on out of court," and added: "They could not do better than employ their moral influence in favor of reforms, the necessity of which is attested as much by the complaints of lawyers that they are idle as by the murmurs of suitors that they are fleeced."¹⁸ Lord Justice Bramwell, of the trenchant pen, in a letter to the Times, attacked the English system of itemizing costs instead of charging them in a lump sum. "There is something wrong somewhere," he said. "The thing has got into a wrong groove. The system is wrong. . . . The obvious tendency of this practice is to multiply items and augment costs."¹⁹ Some pointed to the abuse of interlocutory privileges as the source of the evil; others to the uncoded state of the rules of practice,²⁰ and a large party were in favor of the

¹⁷ In a debate in the House of Commons on August 11, 1883, the Solicitor-General, Sir Farrer Herschell (later Lord Chancellor) admitted the failure of the Judicature Acts in point of economy.

¹⁸ December 1, 1880. Commenting on this and similar articles, the Law Times remarked (70 L. T. 74, December 4, 1880): "It will be remarkable if the constant attention which the most influential journals devote to legal subjects does not bring about the necessary reforms in our procedure."

¹⁹ The letter is reprinted in 25 Solicitors' Journal, 341 (March 5, 1881). On this point the same journal said (May 7, 1881, p. 503): "The apothecary's bill kind of system which at present prevails is a most miserable and unsatisfactory system, but it is difficult to suggest any wholly satisfactory principle."

²⁰ In a letter addressed to Baron Pollock, Mr. (now Sir) Mackenzie D. Chalmers made a number of suggestions for steps to effect reductions in costs, one of which was: "That the statutes, orders and

total abolition of pleadings in all actions.²¹ But the trouble was a complication of disorders, and merely local treatment was recognized to be futile.

At length, at the end of 1880, there was a way opened (to use the Quaker phrase) by which Lord Selborne, then lately become once more the occupant of the wool-sack, was able to set in motion a train of events whose consequences brought on the remedy. On September 17, 1880, Sir Fitzroy Kelly, the Chief Baron of the Exchequer, and on November 20, Sir Alexander Cockburn, the Chief Justice of the Queen's Bench, died. It had been impossible in 1873 to sweep away all distinctions between the three old Common Law Courts, partly because of the personal considerations arising out of the life tenure of the Chief Baron and the two Chief Justices. But now that factor was eliminated, Lord Selborne at once seized the opportunity to complete the work of unification he had begun eight years before. He called together a Council of all the Judges²²

rules of court which regulated civil procedure at the time the Judicature Acts were passed should be expressly repealed, and such of their provisions as may still be required should be incorporated in the Judicature Acts and Rules." The letter is printed in 70 *Law Times*, 20 (November 13, 1880). This course was so obviously necessary that shortly thereafter Mr. Chalmers, together with Mr. (now Sir) Courtenay P. Ilbert, was engaged in the drafting of the Statute Law Revision Acts of 1881 and 1883, and the incorporation of un repealed statutes into the Rules followed soon after. See note 47, *infra*.

²¹ See 25 *Solicitors' Journal*, 503 (May 7, 1881): "Ought Pleadings to be Abolished?" The *Law Times* was the only legal journal actually favoring such a drastic measure.

²² Under §75 of the Judicature Act, 1873. The Act stipulates that such a Council should be held once every year, but this has not been strictly observed. Including the meeting of 1880 the judges have not held a formal Council more than half-a-dozen times since 1873. Lord Chancellor Haldane said he "could conceive of no more futile proceeding. We should meet and it would come to nothing."

which met on November 27 and 29, and he caused them, against a strong minority which held tenaciously to all the old names and dignities, to pass a recommendation that the three Common Law Divisions of the High Court—the Queen's Bench, Common Pleas and Exchequer—should be merged into one, to be called the Queen's Bench and presided over by Lord Coleridge, the surviving Chief Justice then in the Common Pleas. On December 16, the Privy Council issued an Order in Council upon the report of the judges,²³ giving legal effect to their recommendation, and on February 26, 1881, the Order coming into operation, the names of Common Pleas and Exchequer disappeared from the judicature of England.

This outward change in the common law side of the High Court required corresponding changes to be made in its internal administration and procedure, and Lord Selborne, with characteristic enterprise, determined to make it the occasion for a general investigation of the complaints that were making themselves so insistently heard on every side, with a view to introducing any alterations necessary in the system of civil procedure. The Rule Committee of Judges then serving, under the Act of 1876, contained no practising lawyers and its powers were limited within the confines of the Judicature Acts, so he considered it was not the body most suitable for seeking out the causes of dissatisfaction. On January 7, 1881, he addressed a letter to Lord Coleridge, who shared his views and sympathies in legal matters to a remarkable degree, asking him to preside over a committee "to consider and report upon any changes which it may be desirable now to make in the practice, pleading or procedure of the High Court of Justice in connection

(Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Division, 1913, vol. II, p. 191).

²³ As provided by § 32 of the Judicature Act, 1873.

with or consequent on the union of the Queen's Bench, Common Pleas and Exchequer Divisions, or otherwise; and also how far it may be expedient to limit in any respect the rights of appeal at present existing." With the Lord Chief Justice's assent, Lord Selborne associated with him on this board of inquiry ten judges and practitioners drawn from all departments of legal work. Two had served on the original Judicature Commission of 1869, — Lord Justice James, a strenuous reformer, and John Hollams, the most prominent solicitor in London. Lord Shand, a Scottish Judge, was asked to sit with the committee, which became known as the Lord Chancellor's Legal Procedure Committee, to give them the benefit of his knowledge of Scots procedure, a system known to be most efficient.²⁴ Besides these there were two more judges, four barristers and another solicitor.²⁵ As the Committee had no statutory powers or official standing, except the fact of the Lord Chancellor's appointment, it had no power itself to make any changes in the Rules; it was simply to recommend, in an advisory capacity, what changes should be made by those in authority.²⁶

²⁴ Quite recently Lord Loreburn wrote to Mr. Justice Lurton who was working on the new Federal equity rules: "The Scottish system of pleading is, to my mind, the best." (26 Harvard Law Review, 101.)

²⁵ They were Sir James Hannen, the President of the Probate Divorce and Admiralty Division; Mr. Justice (later Lord) Bowen; Sir Henry James, the Attorney-General (who refused the Lord Chancellorship in 1886 because of his opposition to Irish Home Rule); Sir Farrer Herschell, the Solicitor-General (later Lord Chancellor); J. C. (later Mr. Justice) Mathew, and R. T. Reid (later Lord Chancellor Loreburn), to represent the Junior Bar; and Charles Harrison, the official solicitor. The Lord Chancellor's Secretary, Mr. (later Sir) Kenneth (and now Lord) Muir Mackenzie, acted as Secretary to the Committee.

²⁶ Lord Coleridge and Sir James Hannen were *ex-officio* members of the Rule Committee; Sir Kenneth Muir Mackenzie was also Secretary to that Committee. Otherwise there was no connection between the two.

Contemporary opinion did not look for great things from it; it was taken for granted that its work would result merely in the addition of a few amendments to the Schedule of 1875, without attaining any real relief.²⁷

But it set out at once to dig up the whole field with great energy and enthusiasm. Its meetings were frequent and long. Although its proceedings were confidential, rumors of its deliberations leaked out at odd times during the next few months and their character gave rise to the most eager speculation upon the probable result of its findings. It became known that there was a strong feeling in the Committee that pleadings should be altogether abolished, and this report aroused in legal circles discussions more spirited than any since 1873.²⁸ It was, in fact, true. Lord Justice James had, even in the days of the 1869 Commission, urged the abandonment of pleadings, and now he was ardently supported by Mr. Justice Mathew, a judge intolerant of technicalities who believed that all he needed was to see the parties before him to decide their controversy.²⁹ Another influence

²⁷ 70 *Law Times*, 217 (January 29, 1881): "The labours of the committee now sitting to consider the cost of litigation are not expected to be protracted, and new rules, as the result of their deliberation, will probably be issued in the course of next month."

²⁸ Most people were shocked by the news. In February the Incorporated Law Society submitted to the Committee a resolution opposing such an idea. The legal journals printed many sarcastic references to it. It seemed to win some favor, however, for it was said in 16 *Law Journal*, 137 (March 26, 1881): "There are many forms of action in which pleadings are absolutely thrown away, and there are some few in which they are an economy. What is required is to separate the two."

²⁹ He was appointed to the Queen's Bench early in March, 1881, without ever having taken silk. In 1895 he succeeded in establishing a separate List of commercial causes over which he presided. In this List he swept away written pleadings and technicalities of every sort, coming straight to the point of every dispute and bringing the Court into high favor with the London merchants who needed it.

strongly felt in the Committee was that of Lord Shand. He believed strongly in the advantages of the Scottish procedure, in which the issues between the parties are framed not by the contending pleaders but by an officer of the court itself. With his support Mr. Justice Bowen invented what has become known as the "omnibus summons" — a notice by which both parties are brought before a master, soon after appearance has been entered, to receive directions governing the entire future conduct of the action, down to trial — and convinced the Committee of its virtues. It was accepted as a necessary complement to the absence of pleadings. Then on to the topics of chamber work and discovery the Committee proceeded with equal originality, and after them considered in turn the methods of trial, the granting of new trials, the disposition of appeals, and the aggravating subject of costs, coming in every instance to definite conclusions which were embodied, with its reasons, in the Report unanimously signed which it sent to Lord Selborne.

This Report was anxiously looked for by the legal community, but although it was presented in May of 1881, it was not made public for nearly five months. During that time the Lord Chancellor submitted the Report to all the judges of the Supreme Court who had not been members of his Procedure Committee, in order to obtain from them confidential expressions of opinion on the subject-matter of the sweeping recommendations it contained. Their opinions have not been published but it is understood they were by no means a chorus of praise.³⁰ By October they were all in the Lord Chan-

³⁰ 16 Law Journal, 582 (December 10, 1881): "It is no secret that there is great divergence on the bench in reference to the subject of the committee's report. The Lord Chancellor has asked for the criticism of the judges on the report and has been liberally supplied." And 72 Law Times, 127 (December 24, 1881): "There is by no means unanimity among the judges as to the abolition of pleadings."

cellor's hands, and the Report was duly given to the public.³¹ It was found to confine itself exclusively to procedure in the new Queen's Bench Division, not venturing to trespass upon Chancery ground. In twenty-six Resolutions it stated its findings under the Lord Chancellor's order of reference, making in every one of them bold suggestions for reforms at every stage of common law procedure. Its publication brought forward a veritable storm of criticism, both favorable and otherwise, but it was evident that progress in the right direction was at last being made.

In an introduction, the Report states that it aims to show the benefits of "a change in procedure which would enable the court, at an early stage of the litigation, to obtain control over the suit, and exercise a close supervision over the proceedings in the action." That is the keynote of the Report. In harmony with it are its most striking recommendations, described above, to discard pleadings, and to substitute for them mere notices of special matter and directions issued by a master under an omnibus summons. The next change it called for was in the freedom with which discovery could be obtained. The Committee believed that unnecessary discovery had been the greatest source of needless expense,³² and recommended that it should be strictly supervised by the masters and allowed only by their leave. These three recommendations were the ones

³¹ It was published October 3 and appears in full in 25 Solicitors' Journal, 911 (October 15, 1881).

³² "It further appears to the Committee that much of the expense of litigation is now due to the power which the parties have of resorting to all the modes of procedure furnished by the Judicature Acts, without regard to the real requirements of the cases, which might often be dealt with as simply as summary proceedings before magistrates." (Report of the Committee.)

that most attracted the shafts of the critics. One of these wrote:

"Suitors are to be protected not only against one another, but against themselves, by a system of paternal care, directed by that preternatural sagacity, undeviating justice, and disinterested and energetic benevolence which are always supposed to characterize a despotism, but which have hitherto not been cordially accepted among this self-willed and troublesome race."³³

And another caricatured the omnibus summons for directions, under which a master was, at the beginning of the action, to decide how it should be conducted, as:

"This wonderful summons, requiring from the master the sagacity and prescience of Mr. Micawber, at once to see and prescribe for all contingencies up to trial!"³⁴

The principal difference between the Committee and its censors lay in the interpretation of statistics. The Report pointed out that in the previous year only four per cent. of all actions begun in the Common Law Divisions had been carried through to trial, and that in sixty-one per cent. judgment had gone by default either of appearance or of defence; as to the remaining thirty-five per cent. unaccounted for, the Committee concluded that these had been dropped or settled out of court, and that in those cases either pleadings or discovery would have been unnecessary. Its opponents, on the other hand, argued that this thirty-five per cent. of actions withdrawn was exactly the virtue of the interlocutory work. "Discovery has frequently been effectual," they claimed, "in producing the settlement, by making the parties acquainted, before incurring the expense of a trial, with matters which, without it, they would have learned for the first time when they were before the court."³⁵ Perhaps both sides claimed too much, but

³³ 26 *Solicitors' Journal*, 106 (December 17, 1881).

³⁴ 27 *Solicitors' Journal*, 2 (November 4, 1882).

³⁵ 26 *Solicitors' Journal*, 69 (December 3, 1881).

undoubtedly the use of interlocutory applications for discovery, *etc.*, had been abused.

Then there was a recommendation as to the mode of trial. The Committee's aim was to cut down expense and delay, so it devised a way of decreasing the number of jury trials by ruling that all trials should be non-jury except in cases where the master would allow a jury, on a special application under the summons for direction.³⁶ This, and the succeeding resolutions as to new trials, were received with favor. The Committee suggested that the right to have a new trial be limited to certain cases, and that the application for a new trial should be by notice of motion, like the application for an appeal, instead of by an *ex parte* rule to show cause. Appeals, too, were considered, in seven Resolutions which cover appeals from the masters to the court and from the High Court to Divisional Courts and the Court of Appeal.³⁷ Finally, as to costs, the Committee recommended a uniform scale of costs in contentious business in all Divisions of the High Court to stop the practice of bringing common law actions in the Chancery Division because higher costs were allowed there, and they recommended that an especially low scale of costs should be adopted for actions involving £200 or under,

³⁶ This supervision was also intended to do away with this difficulty which had arisen: parties would frequently order put down in the jury list a case which, when it came on for trial, the judge would declare involved matters of account or similar complicated issues, on which a jury were absolutely unfit to pass; he would then order the case sent to a referee, or entered for a non-jury trial. As a consequence, all the counsel, parties and witnesses, would be sent away to wait until the case came on again in the list — a most inconvenient penalty to all concerned.

³⁷ The substance of these Resolutions is to eliminate double appeals where formerly allowed, and to make the leave of a judge a prerequisite to appeal in every case.

to discourage undue skirmishing for such small amounts.³⁸ There were a few resolutions on minor points which have been carried out with great benefit.³⁹

Soon after the Report was published, the Council of the Incorporated Law Society, whose members constitute the branch of the profession in closest touch with the details of procedure, appointed a large committee to consider the Report and declare officially what was the opinion of the solicitors upon it as a body.⁴⁰ The committee reported two months later, approving some

³⁸ From an American point of view one cannot help feeling that the English have not yet solved the question of how to keep down costs. Lord Justice Bramwell's plan to charge them in a lump sum rather than by an itemized bill would probably be a great advance. Perhaps the division of labor between solicitors and counsel is largely responsible for the evil. In a spirited letter in 72 *Law Times*, 321 (March 4, 1882), G., describing himself as a solicitor in active practice for forty years, says: "The simple fact is that the ordinary and average London solicitor is content to be and remain a mere machine — a mere conduit pipe from client to counsel. Does he ever venture to draw any pleading or any affidavit, or notice except those of stereotyped form? Dare he, without counsel, ever attend any judge or master at chambers when anything has really to be argued? We know he never dreams of anything of the kind. He goes to counsel practically for everything. . . . You cannot effectually reduce the time or money employed in contentious business while the present system of procedure and the exclusive audience of counsel prevail. The sooner the now entirely needless distinction between counsel and solicitor, and their dual incumbrance to the suitor, cease, so much the better it will be, not only for the public, to whom it would be a great boon, but to lawyers themselves of either class."

³⁹ For instance, that each action should be assigned to a particular master, who should have charge of all steps taken in it. Also that in the trial lists the jury and non-jury lists should be kept separately. The Resolution that shorthand notes of the proceedings in court should be taken has never, curiously enough, been followed.

⁴⁰ The committee was appointed November 18, 1881, with forty London and thirteen country members, G. A. Crowder, chairman. The list of their names is given in 26 *Solicitors' Journal*, 104.

of the Resolutions and condemning others.⁴¹ They approved of nearly all the recommendations except those giving an official of the court control over the conduct of an action. Especially did they condemn the proposed abolition of pleadings and the summons for directions that was to help supplant them. This opinion, without doubt, had some influence on the weight given to the Lord Chancellor's Committee's recommendations when they came to be considered by the Rule Committee of judges, for it was a carefully thought out and drafted document, and was adopted without a dissenting voice when presented to the Law Society at a large meeting on February 22, 1882.⁴²

At about the same time, the Rule Committee was beginning the long series of discussions out of which finally emerged the new code of Rules of 1883. Lord Selborne had just appointed the new Committee under the Act of 1881⁴³ and had submitted to them the Report of his Legal Procedure Committee, together with the opinions upon it he had received from the other judges. Although the new Committee was not composed of judges committed to the recommendations of Lord Coleridge and his associates, their verdict upon those recommendations

⁴¹ Their report, dated January 30, 1882, appears in 26 Solicitors' Journal, 245 (February 18, 1882).

⁴² The Solicitors' Journal (26 S. J. 255, February 25, 1882), speaks of "the singular care and ability with which that report has been prepared, and the admirable constitution of the committee as representing all shades of opinion."

⁴³ §19 of the Judicature Act, 1881, made the Rule Committee consist of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Divorce and Admiralty Division, and four judges of the Supreme Court named by the Lord Chancellor. The Act was signed in August, 1881, and at the beginning of January, 1882, Lord Selborne appointed Lord Justice Lindley, Baron Pollock, and Justices Manisty and Fry to be the four additional judges.

was, on the whole, favorable,⁴⁴ and they prepared at once to go forward with the work of giving shape to the new regulations. The plan was to alter such parts of the old Rules as were affected by the new proposals, and to that end a rough draft of a set of new rules based on them was placed in the Committee's hands as a basis for argument.

Almost at the very outset, the rule-makers encountered a difficulty that brought their progress to a sharp halt. The foremost of the reforms included in the program was the abolition of pleadings. That was to be accomplished by providing for an indorsement of the plaintiff's claim on his writ, and for mere notices of special matter delivered in lieu of any formal defence or replication. The end to be attained sounded simple enough, but when it came to drafting a Rule which would be clear enough to cover every conceivable class of claim and defence, the Committee could make no satisfactory headway. It soon became obvious, in the arguments that centred about Order III, that in cases where the issues were numerous or complicated such a method of notices would result in a ragged, disconnected kind of pleading entailing more expense than the old. At this juncture, Baron Pollock made the suggestion that there might be a different treatment provided for the simple cases than for the complicated ones, and he undertook to draft an Order on that principle. He drew up a list of actions in which he considered the issue to be so clear that no more was needed than a claim and a denial; in actions "other than the enumerated actions" he proposed to allow written pleadings under a master's supervision. But upon closer inspection this solution proved equally illusory;

⁴⁴ 17 Law Journal, 147 (March 18, 1882): "The Rule Committee of the judges have decided to adopt in the main the recommendations of the committee over which Lord Coleridge presided, and nothing now remains but to settle the details and draft the rules."

it was impossible to predict what actions would resolve themselves into simple issues, or even that the simplest might not develop difficulties such as would render the absence of pleadings a hardship on the parties. The Committee then decided to take expert advice and called in G. Baugh Allen, the foremost pleader of the day, to help draft the troublesome Order. Allen pointed out how useless it would be to segregate actions into artificial classes; his idea was that the Order should merely contain a few brief words of admonition to the pleader on the beauties of brevity and should be supplemented by a copious supply of forms; these forms should cover a varied assortment of causes of action, and should be drafted in model style to serve as the standard to which pleadings should conform. By setting before the pleader such examples of what the Committee desired, he believed all misunderstanding as to what was brief and what was prolix would disappear. The Committee decided to take this channel as the only way clear of the rocks, and Allen was commissioned to draft the pleading Orders and the forms to accompany them, under the supervision of Sir Edward Fry, then a Chancery judge of extreme technical accuracy.⁴⁵ That is the story of the present English method of regulating pleading by reference to the forms.

Naturally, all this took time, and the summer of 1882 was well on its way before the subject of pleading was satisfactorily disposed of, but although the profession were fretting under the delay and anxiety of waiting for changes which they knew would be great,⁴⁶ the

⁴⁵ Now the Rt. Hon. Sir Edward Fry, who, since his retirement from the bench in 1892, has achieved great distinction in various important international arbitrations. He sat from 1900 to 1912 as a member of the Permanent Court of Arbitration at The Hague.

⁴⁶ 17 Law Journal, 401 (July 29, 1882): "It is evident that the ordinary duties of the judges do not admit of their performing those quasi-legislative duties with the despatch which is desirable." And

Committee proceeded slowly and carefully with the rest of its task. Instead of limiting it to the recommendations of the Legal Procedure Committee, Lord Selborne decided it should complete, in the course of its work, the codification which was so badly needed. The draftsmen who were engaged on the repealing act which became the Statute Law Revision Act of 1883⁴⁷ were instructed to include only such parts of the old procedural measures as were unmistakably obsolete; all others they turned over to the Rule Committee to incorporate into the codified Rules, in more or less altered form. With this added material the Committee completely transformed the old Rules of 1875, working slowly on from Order to Order for over a year. Different members of the Committee made themselves responsible for the Orders with which they were most familiar, and each one was worked out separately. The actual drafting was done by many hands. Each member of the Committee would bring in the sections in which he had

nine months later (18 Law Journal, 217, April 21, 1883): "Much of the unsatisfactory state of legal business at the present time may be traced to the injurious influence of rules from which great changes were expected, which were always coming but have never come."

⁴⁷ Mackenzie D. Chalmers and Courtenay P. Ilbert, the Parliamentary draftsmen. The following reference to the work appears in Sir Courtenay Ilbert: *Legislative Methods and Forms* (London, 1901), p. 69: "Soon after the Judicature Acts came into operation, the Statute Law Committee took into consideration the question how far previous enactments were superseded by them or might be superseded by rules of court made under them. Accordingly they instructed Mr. Arthur Wilson to prepare a report on the subject, and in 1878 he submitted to the committee a report on the statutes relating to civil procedure and courts. (Parl. Papers, 1878, lxiii.) The work begun by him was afterwards continued by Mr. Chalmers and the present writer, and resulted in the passing of the Statute Law Revision and Civil Procedure Acts of 1881 and 1883, and in the framing of a large number of rules of court which took the place of previous enactments relating to procedure."

interested himself, and these would then be carefully revised and edited by the Lord Chancellor and his Secretary⁴⁸ to bring them into harmony with each other, especially in the matter of forms of expression. Lord Selborne himself did an enormous amount of work in studying the details of every section of the Rules and forms, to assure himself that every possible defect and inconsistency had been cleared away. His "work on the Rule Committee was more complete and exhaustive than that of anyone else; he was personally responsible for every word. There was literally not one word which he had not read and considered."⁴⁹ Until the end of 1882 the Committee met almost every week to discuss the results as they came to hand; from January, 1883, on, meetings became even more frequent, until in June the Committee sat almost every day in order to complete the undertaking before the Long Vacation was upon them.

In March, 1883, an event occurred which deprived the Committee of the services of one of its most valuable

⁴⁸ Mr. (later Sir) Kenneth (and now Lord) Muir Mackenzie, who, as Secretary to Lord Selborne, had been Secretary to the Procedure Committee of 1881 and was Secretary to the Rule Committee as well. In 1884 he was made Permanent Secretary to the Lord Chancellor, and his presence in that capacity on the Rule Committee from then on to the present day has been a most important factor in giving to the work of the Committee the continuity it would be otherwise difficult for a constantly changing body to attain. Much of the actual drafting of new Rules is done by his hand, and all of it is done under his supervision. In his work on the Rules of 1883 he was assisted by his brother, Mr. M. J. Muir Mackenzie, who in 1905 became one of the Official Referees of the High Court. (Since this note was written Sir Kenneth has retired from office, a peerage was bestowed upon him in 1915 and he took the title of Lord Muir Mackenzie. His successor as Permanent Secretary is Sir Claude Schuster.)

⁴⁹ Note by Sir Kenneth Muir Mackenzie, at p. 93 of vol. ii of Lord Selborne's "Memorials, Personal and Political." (London, 1898.)

members. Sir George Jessel, the Master of the Rolls, died suddenly on the twenty-first of March. He had taken a most active part in the Committee's deliberations, particularly on the Orders affecting chancery procedure, and had been especially helpful in giving the new Rules a practical and workable aspect which would commend them to the practitioner as well as to zealots for reform. "No judge did more to carry out the principles and purpose of the Judicature Acts, and to regulate their operation by the rules of common sense and practical convenience."⁵⁰ His place was filled by Lord Justice Brett, who succeeded him in the custody of the Rolls.

At length on July 9, 1883, after many months of painstaking work, the eight members of the Rule Committee put their signatures to the new Rules, and on the following day the Rules were laid on the table in both Houses of Parliament, in accordance with the Act.⁵¹ Ten days later they were, for the first time, circulated among the profession. They were timed to come into operation on October 24, the ending of the Long Vacation, and immediately a great cry went up that there would not be sufficient time to examine the new Rules and consider them before they took effect, as the Long Vacation was then only a fortnight off. The protest assumed definite shape when Sir Hardinge Giffard⁵² moved in the House of Commons for an address to the Crown praying that an Order in Council should be made annulling the Rules, because of the lack of time for consideration, and both branches of the profession sent official resolutions favoring the motion. It was the first time the procedure had been resorted to since the Judicature Act established it,

⁵⁰ 27 Solicitors' Journal, 342 (March 24, 1883).

⁵¹ § 25 of the Judicature Act, 1875.

⁵² Then in Opposition. Later Lord Chancellor Halsbury, when the Conservatives took office in June, 1885.

and the debate on August 11 brought out some interesting opinions on the constitutional aspects of the Rule Committee as a law-making body.⁵³ The Government did not oppose the motion as a party measure, but despite the non-party vote the motion was lost, the feeling in the House being that it was unwise for the Executive to interfere with the Judicature Rules unless the judges attempted to effect some grave constitutional change under the color of rules of practice. After that the active members of the Inns of Court and the Law Societies settled down to study the new Rules and Forms, and many a man's vacation in the summer of 1883 was made weary by the companionship of that bulky volume. On October 24, they went into effect, and have since been the basis of the Supreme Court practice, frequently amended but never revised.

⁵³ Reported in Hansard, vol. 283, 3d series, pp. 146-187.

CHAPTER VII.

THE REVISION OF 1883: ITS CONTENTS.

As compared with the Rules of 1875, the physical bulk of the new Rules was their first attribute to draw the attention. Together with the twelve sets of amending Rules launched between 1875 and 1883, the old Rules amounted to less than six hundred in number; the new came up to the imposing total of eleven hundred, divided into seventy-two Orders, as against the sixty-three Orders of old. But the fear that such an increase was oppressive was soon dispelled when it was discovered that nearly four hundred of the Rules were transcriptions from previously scattered statutes and regulations, so that there had been completed a true code of procedure. In fact, the Rule Committee had consolidated over eighteen hundred scattered sections of statutes and rules into a fairly compact and logical arrangement,¹ and the Statute Law Revision Act in 1883 completed the work by repealing practically all old procedural legislation rendered obsolete by the new code.² Roughly one-half of the new Rules are reproductions, with or

¹ As stated by Mr. James (now Viscount) Bryce, in the debate in the House of Commons.

² The full text of the Rules of 1883 can best be consulted in Wilson: *Judicature Acts and Rules* (4th ed., London, 1883). A few subjects were omitted both from the repealing acts and from the new Rules, whether by intention or inadvertence does not seem clear. They include the Rules made under the Companies Acts, 1862 to 1867; the Liquidation Act, 1868; the Debtors Act, 1869; the Settled Land Act, 1882, and the Conveyancing Act, 1882. The full list is given in F. R. Parker: *Analytical Index of the Judicature Acts and Rules* (London, 1883), p. v of introduction.

without alterations, of Rules in the Schedule of 1875 or its amendments;³ the other half are principally devoted to replacing statutory rules, and only about one-sixth of the whole are absolutely new.⁴

In general arrangement the new Rules correspond closely to the old; wherever possible the Order numbers were retained, so as to create the least inconvenience, and the new matter was introduced largely by increasing the length of Orders here and there throughout the Schedule rather than by merely adding it in separate Orders at the end. In this manner, despite their tripartite origin, the Rules remained in their familiar form, and practitioners could, without deep research, turn with reasonable confidence to the part of the book in which they needed to look for any particular Rule.

The new matter in the Rules, though scattered all through them according to its place in the chronological sequence of the Orders, falls into two classes, of which the first consists of Rules imported from statutes and regulations almost unchanged, to consolidate the law, and the second of Rules which effect material alterations or introduce entirely new ideas in the court's procedure.⁵ Most of the former are drawn from the Chancery Amendment Acts and the Consolidated Chancery Orders of

³ Five hundred and forty-two out of the whole eleven hundred. Of the old Rules, one hundred and eighty-nine are reproduced *ipsissimis verbis*, two hundred and thirty-three slightly altered and one hundred and twenty materially altered. Thirty-seven are omitted.

⁴ Three hundred and ninety-four of the new Rules derive from old statutes or regulations. Of these twenty-eight are reproduced *ipsissimis verbis*, two hundred and eighty-three slightly altered and eighty-three materially altered. The remaining one hundred and sixty-four Rules contain the provisions altogether new.

⁵ Three hundred and eleven Rules belong in the first class, three hundred and sixty-seven Rules in the second. A detailed analysis showing the source of each of the eleven hundred new Rules, and the disposition made of the old Rules and statutes drawn from, will be found in Parker, *op. cit.*

1860, as the framers of the 1875 Schedule had been satisfied to let the old chancery practice remain pretty much as it was before.⁶ Thus regulations were introduced affecting investment of funds in court, suits *in forma pauperis*, the administration and execution of trusts, the taking of accounts, the use and making of affidavits, the examination of witnesses out of court and the perpetuation of testimony, the appointment of receivers and the use of equitable execution, sales of property by the court, the conduct of matters in chambers, the duties of clerks and registrars, and other items of what had been exclusively chancery business. Another important subject upon which a considerable body of Rules was added was that of costs; these come principally from a special Order on costs issued as an amendment to the 1875 Schedule, but also from old rules on both sides of the court. Admiralty rules form another important addition, as do rules on interpleader proceedings. There are many minor additions, as there were twelve statutes and fourteen different sets of rules drawn upon in all, apart from the 1875 Schedule itself.⁷

⁶ Twenty-two of the Consolidated Orders were drawn upon for Rules, especially Order I, from which twenty-six, Order XXXV, from which forty-eight, and Order XL, from which nineteen, were taken.

⁷ The full list (given in Parker, *op. cit.*) includes the 11 Henry VII, c. 12 (one Rule), 9 & 10 Will. III, c. 15 (one Rule), 1 Will. IV, c. 22 (three Rules), 1 & 2 Will. IV, c. 58 (three Rules), 5 & 6 Vict., c. 69 (two Rules), 15 & 16 Vict., c. 76 (twelve Rules), c. 80 (twelve Rules), c. 86 (nineteen Rules), 16 & 17 Vict., c. 78 (one Rule), 17 & 18 Vict., c. 125 (fifteen Rules), 23 & 24 Vict., c. 126 (seven Rules), 24 & 25 Vict., c. 10 (one Rule), the Reg. Gen. of Hilary Term, 1853 (twenty-nine Rules), the Reg. Gen. of Trinity Term, 1853 (five Rules), the Chanc. Reg., 1857 (fifteen Rules), the Admiralty Rules, 1859 (fifty-one Rules), the Consolidated Orders of the Court of Chancery, 1860 (one hundred and eighty-nine Rules), the Chancery Order of March 20, 1860 (four Rules), of February 1, 1861 (two Rules), of February 5, 1861 (two Rules), of November, 1862 (one Rule), of

But the three hundred and sixty-seven Rules which represent the distinctively new element in procedure are the ones that contain the most interest. These are the kernel of the reforms introduced into the Judicature Rules by Lord Selborne⁸ and are the fruit of the recommendations made by his Legal Procedure Committee in 1881. Other influences that helped to develop them were the Law Society's Report upon the Legal Procedure Committee's work, a large number of decisions in the Court of Appeal interpreting doubtful sections in the Schedule of 1875, and, not least, the discussions of the Rule Committee itself,⁹ aided by the Lord Chancellor's constant and personal co-operation.

As described above, pleading was the first large problem the Committee tackled and its solution was to command that all pleadings should be more concise and that the parties might, if they chose, or must, in certain cases at a master's order, dispense with pleadings altogether. A complete set of forms was provided in the new Appendices to guide the pleader in the way he should go, and it is there that the changes called for are most clearly indicated. On the whole, competent critics declared that the effect was to return to a system very much like that in use under the Common Law Procedure Acts, but

1865 (ten Rules), the Reg. Gen. of June 6; 1867 (one Rule), of Michaelmas Term, 1869 (six Rules), the Chancery Order of January 7, 1870 (one Rule), and the Admiralty Rules of 1871 (one Rule).'

⁸ An analysis of these, with similar provisions in the old practice in parallel columns, by John Eldon (now Mr. Justice) Bankes, appeared in 75 *Law Times*, pp. 288, 300, 313, 328, 341, 352, 364, 375, 392, 403, 404, 420 and 422.

⁹ One gathers, from the reminiscences of contemporaries, that these were not dull, as the Committee was fairly divided in its habits of thought. Lord Coleridge and Lord Justice Lindley were the keenest advocates of new provisions; Sir James Hannen and Mr. Justice Manisty, opposed to violent changes, exercised an influence for restraint and accuracy.

there is no doubt that the device of requiring conformity to the official forms was a longer step towards bringing pleading up to the standard of the Judicature Act ideal than anything that had been tried before. Comment on the forms themselves, *qua* forms, has always been divided in tone. A contemporary critic said: ¹⁰

"The forms of pleading must be considered as much superior to those which they supersede. . . . With these models before his eyes no one who understands his profession, and who is instructed with reasonable care, can fail to state with clearness the nature of the case."

On the other hand, a somewhat reactionary article in the *Encyclopaedia Britannica*¹¹ which attacks the Rules as a whole declares: "It is true that these forms do not display a high degree of excellence in draftsman-ship," and one of the present King's Bench masters whose opinion on matters of procedure is in the highest degree expert testified before the recent Royal Commission on Delay in the King's Bench Division that "one of the great difficulties that one has to deal with in dealing with the pleadings is that the Rules are altogether inconsistent with the forms. . . . The Rules say one thing and the forms say another."¹²

Whether precise or not, however, the forms indicated the changes the committee wished made, and in that purpose they were successful. In the new pleading, moreover, precision of form has lost its former glory completely and been forgotten together with the time when "the form was preferred to the substance, the state-

¹⁰ 27 Solicitors' Journal, 611 (July 14, 1883).

¹¹ 11th ed., vol. 15, p. 541, tit. "Judicature Acts." Written in 1902 for the Supplement to the 9th ed. by Lord Davey, then a member of the Judicial Committee of the Privy Council.

¹² Master T. Willes Chitty. Minutes of Evidence taken before the Commission (Parl. Paper Cd. 6762, 1913), vol. i, p. 23. See also Chap. XVII.

ment to the thing stated.”¹³ Two innovations made in 1883 finally disposed of its ancient high estate. One is the brief Rule that “No technical objection shall be raised to any pleading on the ground of any alleged want of form,”¹⁴ and the other is the abolition of demurrers. This last was the most important reform introduced by the Rule Committee on its own initiative and was its strongest blow against the hateful rule of technicality. Under the court’s new liberality in allowing amendments, the use of demurrers had, it is true, degenerated into a sort of rapier play by which a party would drive his opponent to amend a pleading without really affecting the result of the action. They were principally useful for their annoyance and their cost. “No instrument was better adapted for deciding a genuine point of law, fairly raised on the pleadings, and going to the substance of the case; but it was so seldom that these conditions were all combined, that proceedings on demurrer were more often than not a vexation to those who had to argue them, and a useless increase of costs. It must be said, indeed, that the prejudice against demurrers was so great upon the bench, that they did not by any means get fair play; probably a consciousness of the injustice which, in former times, the court had often allowed demurrers to inflict on suitors, united its influence with a daily increasing reluctance to lay down strict legal principles, in bringing them into disfavor.”¹⁵ The consequence was that the whole tradition of arguments on demurrer was shaken off.

In place of the demurrer (“No demurrer shall be allowed” says the Rule¹⁶ succinctly) the pleader is

¹³ Lord Chief Justice Coleridge to the American Bar Association, at New York, October 11, 1883.

¹⁴ Order XIX, Rule 26.

¹⁵ 27 Solicitors’ Journal, 692 (August 18, 1883).

¹⁶ Order XXV, Rule 1.

privileged to raise an "objection in point of law," which will be disposed of, in the ordinary case, either at or after the trial of the facts, instead of at some time before.¹⁷ In addition, there are powers to have the "point of law" argued before the trial if actually necessary, to make the decision on the argument apply to the whole or only to parts of the claim or defence, and finally, for very clear cases, to order a whole pleading struck out "on the ground that it discloses no reasonable cause of action or answer."¹⁸ It is only in exceptional cases, however, that a point of law will be decided before the facts themselves are heard; the application will be refused "especially if the decision of the question of law will not necessarily dispose of the whole matter."¹⁹ This provides an elastic and comprehensive system under which, with due regard to the actual proved facts of a case, substantial points of law, either small or great, "can still be raised on the pleadings as neatly as and with greater facility than before."²⁰ The only objection to this improvement came from those to whom the old punctilio and preciseness of common law pleadings was still dear; they bewailed the passing of the old order. "Formerly the pleader had the fear of a demurrer before him," complains Lord Davey²¹; "nowadays he need not stop to think whether his cause of action or defence will hold water or not, and anything which is not obviously frivolous or vexatious will do by way of pleading for the purpose of the trial and for getting the opposite party into the box."

¹⁷ It is open to both parties to raise such an objection.

¹⁸ Order XXV, Rules 2, 3, 4.

¹⁹ *Per* Lindley, L. J. (who was active in the Rule Committee), in *Cocksedge v. Metropolitan Coal Co.*, 65 Law Times Reports, 432, 434 (1891).

²⁰ 18 Law Journal, 409 (July 28, 1883).

²¹ *Encyclopaedia Britannica*, cited *supra*.

But such a comment overlooks the new channel through which all actions must flow before reaching trial, the channel which takes them through the masters' chambers under the safe conduct of the summons for directions. The "omnibus summons" proposed by Lord Selborne's Procedure Committee in 1881 has, indeed, found a place in the Rules and by virtue of its authority the master stands as arbiter between the parties and the court. Upon its issue, soon after the defendant has appeared, the action is assigned to one of the masters who thereafter has complete charge of the proceedings up to trial; no step can be taken without his leave, and his decisions clear the air of many matters that might cloud the issues when they come to trial.²² His presence is the visible symbol of the control over the course of an action, now lost to the parties themselves, which is exercised by the court.

One of the most useful of his functions is the treatment of claims for which summary judgment may be given; these included liquidated money claims under the old Rules, and in 1883 were extended to cover actions for the ejectment of a tenant of real property whose term has expired or been determined by notice to quit.²³ Where the defence is not shown, on affidavit, to go to the merits, final judgment is at once given by the master; wherever there does seem to be a question for trial in such cases it is almost invariably a question of fact, usually as to the amount due, and the master may then admit the defendant to a defence, on proper terms. Under the 1875 Rules, the payment into court of the sum in dispute was the only condition he could impose;

²² Order XXX. The summons for directions was optional in 1883, but has since been made compulsory in all but a very few cases.

²³ Order III, Rule 6. This extension was in response to a request made in the report of the Law Society's committee which reviewed the work of the Legal Procedure Committee.

the 1883 changes make him free to dictate the time and mode of trial as further conditions to defence.²⁴ He can put an end to delay by ordering an immediate trial by a judge without a jury, on the writ and affidavit, without further pleadings or interlocutory applications of any sort.²⁵

Another matter which is dealt with on the summons for directions, in which changes were introduced in 1883, is the granting of discovery. To administer interrogatories no leave had been necessary under the former Judicature Rules, but the 1883 Rules make the leave of the master prerequisite in all cases except actions involving fraud or breach of trust,²⁶ and before granting leave the master is required to take into account any offer by the other side to give particulars, make admissions, or produce documents. Then the order for discovery of documents is somewhat modified; although previously granted as of course, it is provided that it may be limited to certain classes of documents or to documents affecting only a part of the case, or be refused altogether.²⁷ Finally, a party seeking either to administer interrogatories or to obtain discovery of documents is required to deposit into court the sum of Five Pounds as an earnest of good faith, to cover the costs, which sum he will be repaid only if it develops that his step in seeking

²⁴ Order XIV, Rule 6.

²⁵ To make these cases come to trial without delay a separate list was established in 1893, called the Short Cause List, into which cases may be put which can be tried in a half-hour. This list is taken on Saturday mornings, and frequently judgment will be entered within a fortnight of the defendant's appearance, even though he contests the claim.

²⁶ Order XXXI, Rule 1. This exception was removed in 1893.

²⁷ Order XXXI, Rule 12. The order for discovery of documents is now, however, practically never refused or limited.

recovery was reasonable.²⁸ All these restrictions were imposed to carry out the Legal Procedure Committee's recommendation that the right to discovery should be curtailed because it had become a source of needless expense. Besides these limitations a few useful extensions are made in the practice; one is to permit a party to call on his opponent to admit certain facts or bear the costs of having them proved²⁹; another is that bankers' and other business books may be inspected at their usual place of custody, instead of at a solicitor's office.³⁰

Payment into court is another interlocutory step into which an important change is introduced. Previously such a payment could only be understood as an admission of the claim *pro tanto*, and the claimant was always entitled to go on with the action in an attempt to recover more. The 1883 Rules introduce a new form of payment in, which makes it possible for a defendant, with his defence, to pay money into court "with a denial of liability."³¹ The advantage of this is that though it may be less than the plaintiff claims, the plaintiff must, if he accepts the sum and wishes to take the money out of court, accept it in full satisfaction of his claim, and cannot, after taking it out, go on with the action in an attempt to recover more. If, on the other hand he rejects the sum paid in as insufficient and does not take it out,

²⁸ Order XXX, Rule 26. This restriction was removed in 1905, and security for the costs of discovery is now ordered only in exceptional cases.

²⁹ Order XXXII, Rule 4. This carried out a recommendation, hitherto unnoticed, of the original Judicature Commission of 1869. It is, however, a procedure not frequently resorted to.

³⁰ Order XXXI, Rule 17. This saves business people much annoyance.

³¹ Order XXII, Rules 1 and 6. This was one of the provisions developed out of the decisions in the Court of Appeal. It is similar to the "offer of judgment" in some American code states, but has the advantage of "money down."

and then, at the trial, recovers less than that amount, he is liable to pay the defendant's costs. The object of this innovation is to provide a medium of compromise for cases where the defendant is willing to pay something for the sake of peace, rather than incur the expense and risk of proving he is not at fault. In the same Order is included a most beneficent provision that money recovered by or for infants is to be held in court and invested or paid out only as directed by the judge, rather than handed over to the infant's guardian or solicitor.³²

The Rules on trial and judgment were subjected to some alterations, none of them of a startling nature. Order XXXVI, on mode of trial, was recast so as to make it more evident that trial by a judge alone was considered the form most favored: in actions for slander, libel, or other attacks upon reputation, an absolute right to have a jury as of course is preserved; in all other actions, a special application for a jury must be made. This application will ordinarily be granted except in cases involving prolonged or scientific investigation of facts, accounts, or documents, and for issues which properly belong in the Chancery Division. But the normal mode of trial is that without a jury. A further incentive to the parties to avoid jury trials is the creation of separate lists for jury and non-jury actions³³; the latter are always disposed of more quickly than the former, so the court is more approximately abreast of its work in that list, while the jury trials are often weeks behind. As with other parts of the Rules, miscellaneous improvements are effected in minor matters; among

³² Order XXII, Rule 15. This Rule has since been altered, to make the newly (1906) created Public Trustee the custodian of the fund. Guardians of infants are not required in England to give bond.

³³ This and the other alterations in Order XXXVI were made upon the recommendation of the Legal Procedure Committee.

others, the master is given jurisdiction to try interpleader issues,³⁴ which usually arise out of execution on a judgment and ought not to be held up by being set down in a list for trial in court; any trial or appeal judge is authorized himself to inspect any property or thing in dispute³⁵; although judgment is usually entered as of the day when it is pronounced, the court is given power to order that it should be antedated or postdated if necessary³⁶; and it is provided that a judgment creditor may issue execution for the amount of his judgment alone without waiving the right to issue a later writ for the amount of his costs.³⁷ Then there are several changes as to the relation of parties to judgments; new trials may be granted as to some of the parties, while the result as to others is left untouched³⁸; if some of several defendants fail to appear, the plaintiff may, if his claim is unliquidated, take interlocutory judgment against those in default and have his damages assessed finally at the trial of the others³⁹; and the third party procedure is improved by making it possible to sign judgment in the principal action against the third party, instead of having to sue him in a separate action after his liability has been established.⁴⁰

³⁴ Order LVII, Rule 8.

³⁵ Order L, Rule 4, an equivalent of the jury's "view."

³⁶ Order XLI, Rule 3, a power exercised, for instance, when judgment has been reserved and rights are prejudiced by the delay.

³⁷ Order XLII, Rule 18. Formerly he had to include costs in the first writ or waive them.

³⁸ Order XXXIX, Rule 6. The practice on applications for new trials is assimilated to that on appeals. The motion now is to the Court of Appeal, and is usually "for judgment or a new trial."

³⁹ Order XIII, Rule 6. This Rule supplied an obvious omission in the old Rules on default.

⁴⁰ Order XVI, Rule 52. This had been held necessary under the old Rules. The new Rules also clear up a doubt by expressly providing that a defendant may make one of his co-defendants the third party from whom he claims indemnity.

A most interesting innovation of important consequences and deserving of separate mention is Order XXV, Rule 5, which permits the court to make binding declarations of rights, "whether consequential relief is or could be claimed or not." This introduces for the first time the practice of giving decisions on points not actually in litigation. It is limited, however, to cases where the plaintiff has a cause of action, the court awarding merely a declaration asserting his right without awarding damages or an injunction; and it has been held that the declaration claimed must be ancillary to the putting in suit some legal right.⁴¹ One instance of its use is when, in an action against one member alone of a numerous class, for the infringement of a right they are all violating, a declaration is asked for that the right exists as against them all. The power to declare rights provides a convenient form for settling a real dispute in any case where the parties will be guided by the court's judgment in arranging their affairs without having to bring all the consequential details before the court.⁴²

Then costs, the subject which had so agitated the Procedure Committee, was raised to the dignity of one of the largest Orders in the Rules. Instead of a brief four-line Order, leaving all costs to the discretion of the judge, there is now a long Order⁴³ containing twenty-seven Rules and fifty-eight sub-Rules, collated from the previous Rules issued under the Judicature Act as an amendment to the 1875 Schedule, the Chancery Orders on costs, and the new provisions suggested in the Pro-

⁴¹ *Per* Collins, M. R., in *Williams v. Collieries*, [1904] 2 K. B. 44, 49. The Rule is an extension of the Chancery Amendment Act of 1852 to include future rights.

⁴² See for instance *Société Maritime v. Venus S. S. Co.*, 9 Commercial Cases 289 (1904); *Ankerson v. Connelly*, [1906] 2 Ch. 544; *Jenkins v. Price*, [1907] 2 Ch. 229; *Wilson v. Harper*, [1908] 2 Ch. 370.

⁴³ Order LXV.

cedure Committee's Report. The latter are, in the main, the requirement of a uniform scale of costs in all Divisions of the court and the setting out in detail of higher and lower scales of fees to be applied by the taxing masters in allowing costs, — the lower scale to be applied in ordinary cases, the higher in those of unusual difficulty. The drafting of these scales and the adjustment of the charges in their various parts in proportion was considered a work requiring the greatest knowledge of the details of practice, and was entrusted to Richard Bloxam, the old Senior Taxing Master of the Day. He worked on these scales under the personal supervision of Lord Selborne, and in the subsequent revision in Committee, Sir George Jessel proved of great service in protecting the interests of solicitors, so that proper provision might be made for their remuneration in every class of work coming into the court. In Rule 27, which is for the guidance of taxing masters, there are a few innovations which it may be of interest to point out: parts of any papers used in the action which the taxing master, in his discretion, considers unnecessary, may be struck out ⁴⁴; he is not to allow the costs of more than one extension of time for the doing of any act in the cause, unless such extension was due to some cause other than the party's fault ⁴⁵; he is not to allow the costs of any steps which have been due either to the party's over-caution or to his neglect ⁴⁶; and when costs are payable out of some

⁴⁴ Order LXV, Rule 27 (20). Two interesting Rules as to the sufficiency of affidavits may be here noted. Order XXXVIII, Rule 11, provides that a judge may order to be struck out from any affidavit any matter which is scandalous; and Order XXXVIII, Rule 16, provides that no affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself.

⁴⁵ Order LXV, Rule 27 (24).

⁴⁶ Order LXV, Rule 27 (29).

fund he may direct that some of the interested beneficiaries be represented at the taxation, if they are not already before him. A new Rule on unnecessary costs which aroused great comment in 1883 is one which provides that a solicitor may be made to pay out of his own pocket any costs improperly incurred, as well as costs which, though properly incurred in the cause, have, through his neglect, proved fruitless to his client.⁴⁷

None of the improvements outlined in the foregoing paragraphs has, however, had results which can compare in breadth of scope with the benefits which have been obtained through the development of the chamber work in the Chancery Division brought about by the perfection of what is known as the "originating summons," first introduced into the Rules of the Supreme Court in the revision of 1883.⁴⁸ To understand what a reformation it effected it is necessary to appreciate the difficulty it was designed to meet.

Decedents' estates are not administered, as a rule, in England, under the close supervision of the courts which is imposed in American systems of distribution. Once the will has been proved or letters of administration have been issued, the executor or administrator goes ahead with the work of collecting and liquidating the assets and paying them out to creditors or beneficiaries, without reference to any court for the approval of claims or the audit of accounts. He is bound to account to the persons interested under the will, as any other trustee is to his *cestuis que trust*, but there is no court to which he must, in the ordinary case, submit his account for adjudication. Only if he fails to administer his trust with due diligence or in good faith, or if it is known

⁴⁷ Order LXV, Rule 11. This was bitterly attacked by the solicitors in 1883, but it has remained unaltered and its application, while not frequent, is not rare.

⁴⁸ Order LV, Rules 3 to 11.



that he contemplates taking some step which the persons interested under the will consider will be inimical to their interests, or if the estate is insolvent, or if there is some doubt or dispute as to the persons rightfully entitled to receive funds or property from him, especially when he wishes to protect himself against a possible insufficiency of assets by an order of court before making any payments, is there any occasion for his coming or being brought into court. By gradual extension of its powers the Court of Chancery had, by the beginning of the nineteenth century, assumed exclusive jurisdiction over difficulties arising out of the distribution of decedents' estates,⁴⁹ and it was to equity that dissatisfied creditors or legatees and cautious executors or administrators turned for relief when any such occasion arose. There was but one way under the old equity procedure to obtain the benefit of the chancery machinery, and that was to bring a bill asking that *the entire estate* be administered by the Court of Chancery. Whenever, therefore, a single creditor felt aggrieved or a doubt arose out of a single phrase in the will there would be a struggle, more or less protracted, on bill, answer and affidavits, which would result in a judgment that all the funds and property in the estate should be paid into court; this would be followed by the taking of accounts and inventories *ab initio* of all the decedent's estate, real and

⁴⁹ The growth is traced in Story, Pomeroy, and other works on Equity Jurisprudence. By reason of the creation by statute of probate courts which enforce the payment of a decedent's debts and legacies and demand an accounting from his executors and administrators, the equitable jurisdiction to administer decedents' estates has fallen into disuse in the state courts of the United States; it might still be invoked in the Federal courts by reason of diverse citizenship of parties. See Pomeroy, §1129. In most of the states, however, the ordinary courts of equity would still exercise jurisdiction over the administration of any trusts that were created in a will.

personal, and of his debts, devises and legacies, all the items in which would have to be corroborated by affidavits and inquired into *seriatim* by a force of chief clerks, junior clerks, assistant clerks and other clerks to the chancery masters and judges. Once the judgment was entered, the trustee became merely the agent of the court to receive and pay money, although each sum had to be handed on by him to the court after formal permission to pay it in had been granted, and no money could be paid out until the court paymaster had been amply fortified with affidavits and certificates of authority for each separate payment. If there was property to be sold, the court would transact the sale itself, going into such infinite detail as to draw up, by its "conveyancing counsel," the auctioneer's "conditions of sale," the terms of payment and settlement, and the form for the public advertisement. When at last there was some distribution to be made there were more formalities about the proper certification and arrangement of the numerous and complicated priorities which the English law establishes in such a distribution. Every step in this process was attended with appointments before judges' clerks, repeated adjournments for time or further consideration, copying of documents, drawing up of reports, drafting of orders, and such shoals of affidavits and summonses that the weary beneficiaries were happy when they were at length rewarded with some proportion of the wealth that they had to watch slowly dissolving from their grasp.⁵⁰

⁵⁰ See Parkes: *History of the Court of Chancery*; Kerly: *History of Equity*; or Mr. Birrell's lecture: *Changes in Equity Procedure and Principles*, in *A Century of Law Reform*. For a technical but admirably lucid account of the present procedure in the administration of a decedent's estate by the Chancery Division, see Stephen: *Commentaries on the Laws of England*, revised by Edward Jenks (16th ed., London, 1914), vol. 3, pp. 595-617.

By 1850 the courts were beginning to realize they existed for the benefit of suitors, and the great Common Law Procedure Act was followed by several statutes effecting changes in the procedure of the Court of Chancery. One of these, the Amendment Act of 1852, contained a provision touching the particular problem now in hand.⁵¹ It enacted that any person claiming to be a creditor of any deceased person or interested under his will might, without filing a bill in equity or taking any preliminary proceedings, summon the executor or administrator to appear in the chambers of a chancery judge, there to show cause why "the usual order for the administration of the estate of the deceased" should not be made. This had the effect of eliminating the expense and delay of the proceedings prior to the judgment for administration, by eliminating pleadings in equity and substituting for them a simple summons to appear and show cause, and by permitting the application to be dealt with in chambers instead of requiring it to go into the trial list and wait its turn for disposition. This was undoubtedly a great improvement, but it left the latter half of the abuse untouched; the judge could still make no other order than one for the general administration of the whole estate in chancery. He could not hear argument on the claim of one distributee and order payment made; he could only order that the entire estate be paid into court and there inquired into in the manner described. The theory was, of course, that while at law a creditor might previously have sued and collected his entire claim irrespective of the total assets in hand, the Chancellor, more tender in conscience, would make no payments until he felt certain that the distribution would be fair to all concerned. Where proceedings were

⁵¹ The Chancery Practice Amendment Act, 1852 (15 & 16 Vict., c. 86), §§ 45-47.

hostile, therefore, even with the new facilities offered by the summons in chambers, an order for administration tied up the entire estate for an indefinite period. To be sure, there were many cases where the trouble was not actually contentious, — an executor might simply wish to get the court's protection, or its opinion on the propriety of a payment or sale; in that case he was obliged to arrange with the beneficiaries to file a bill in equity against them to which they would put in an answer, thus raising the point in question on the pleadings. Having obtained a decision on it at a preliminary stage, the executor would then stay the proceedings, pay the costs out of the estate, and act upon the interpretation of his duties so obtained. When the first Judicature Act was passed, that was the situation with regard to the administration not only of the estates of decedents but of trusts of every kind. In cases of doubt or dissatisfaction the only course open to the court was to take over the entire trust. Such an evil was rendered all the more acute by the enormous quantity of property which in England is held in trust either under wills or marriage settlements.

No change was made in the procedure in Chancery chambers by the 1875 Rules, all such practice being preserved by the clause in the Act saving existing procedure not expressly superseded.⁵² But the subject was given close attention when the Chancery Orders on chamber work were consolidated into the Rules in 1883, and the most difficult work of the draftsmen of the 1883 Revision Act in selecting parts of statutes to be repealed, was to separate the sections to be molded into new Rules from the sections so clearly obsolete as to warrant deletion. Curiously enough one of the sections which they considered belonged in the latter class was that portion

⁵² § 21 of the Judicature Act, 1875.

of the Act of 1852 whose operation has just been described; so unsatisfactory was the result it drew after its application — throwing into Chancery of the entire estate — that its use had been resorted to only in rare instances. When the Lord Chancellor, who examined the revision bill with the same painstaking care he bestowed upon the drafts of the new Rules, came upon that section in the draft submitted to him for approval, he was struck by the fact that a provision containing possibilities for good should have fallen into disuse, and decided to withhold the section from the repealing Act until he could consult with the two expert advisers of the Rule Committee on matters of chancery procedure, Sir George Jessel and Sir Edward Fry. The Master of the Rolls was emphatic in declaring that the procedure under the old Act was worth reviving and that it could be improved upon by giving the court power to decide the specific point raised in any single summons without ordering an administration of the whole estate in court. Mr. Justice Fry concurred in this view and, at Lord Selborne's request, drew up a set of Rules to carry out the new suggestion; they form the nucleus of Order LV, on Procedure at Chancery Chambers. Thus was born the "originating summons,"⁵³ whose growth has completely transformed the work of the Chancery Division.

Of the ten heads of equitable jurisdiction, cases arising under which are specifically assigned to the Chancery Division by the Judicature Act,⁵⁴ two are selected in

⁵³ In an ordinary action a "summons" is a notice that some interlocutory application will be made, so it can never issue until after writ. In the cases where the new summons is permissible, it is not preceded by a writ, therefore it is said to "originate" the proceeding.

⁵⁴ § 34 of the Judicature Act, 1873. It provides that there shall be assigned to the Chancery Division all causes and matters for any of the following purposes:

1. The administration of the estates of deceased persons.

the new Rules as the proper departments within which the new procedure is to operate. All questions arising in the administration of any decedent's estate or of any trust, which before 1883 would have been the proper subjects of an administration action,⁶⁶ may now be raised by simply issuing a summons which states the nature of the relief required and enumerates the parties and interests affected thereby. All necessary parties are served and must be represented either individually or by classes when the matter comes up for the hearing in chambers. At the first meeting the applicant will present to the master the evidence in support of his application, in affidavit form; if the matter is such that the respondents have cause to object, the master will order them to file their evidence on affidavit and fix a time within which they shall do so; he may also allow the other side to file evidence in reply, and if necessary there may be cross-examination either before the judge in court, with his consent, or before one of the official

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2. The dissolution of partnerships, or the taking of partnership or other accounts.
 3. The redemption or foreclosure of mortgages.
 4. The raising of portions, or other charges on land.
 5. The sale and distribution of the proceeds of property subject to any lien or charge.
 6. The execution of trusts, charitable or private.
 7. The rectification, or setting aside, or cancellation of deeds or other written instruments.
 8. The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases.
 9. The partition or sale of real estates.
 10. The wardship of infants and the care of infants' estates.

⁶⁶ In 1885 the subject of redemption and foreclosure of mortgages was added, and later that of infants' estates. Proceedings under a variety of statutes are also directed to be begun by originating summons. These include especially the Trustee Act, 1893; the Settled Land Acts, 1882 to 1890; the Lunacy Acts, 1890 and 1911; the Land Transfer Act, 1897, and the Finance Act, 1894.

examiners. When all the evidence is before the master he will make an order thereon, granting the relief prayed for or refusing it, except in those cases which, by the Rules or by the personal orders of the judges, must be dealt with by the judge in person. The master's decision, too, is subject to review by the judge to whose chambers he is attached. The entire proceeding will frequently be concluded within a very short period (unless unforeseen delays or difficulties arise) and the point decided "without the tedious and often unnecessary accounts and inquiries which were almost invariably directed by an administration decree or order under the old practice."⁵⁶

In this manner a very large proportion of matters disposed of by the Chancery Division are dealt with.⁵⁷ It suffices in every case where either there is no dispute but merely a desire to take the opinion of the court, and in all cases where there is a dispute and the issue is so clear that pleadings would be unnecessary. The former class form numerically the larger of the two; it was said of matters to be disposed of by the originating summons, when its new form was developed: "The characteristic circumstance is that the claims, though open to contest, are in fact so little seriously contested, that the exercise of the jurisdiction presents the appearance rather of the mere administration of business than of the exercise of compulsory powers."⁵⁸ But the contentious matters are also numerous, and this method of dealing with them in chambers without the expense of pleadings or the delay of waiting for trial has caused the originating summons to grow steadily in the favor of that large portion of the

⁵⁶ *Encyclopaedia of the Laws of England* (2d ed., London, 1906), vol. 2, p. 64, tit. Chambers, Chancery Division.

⁵⁷ In 1912 there were begun in the Chancery Division 2537 proceedings by ordinary writ and 2819 by originating summons.

⁵⁸ 27 *Solicitors' Journal*, 664 (August 4, 1883).

English public whose interest in the proper administration of trust funds and property is intimate and sometimes pressing.

Perhaps the most interesting development of the originating summons came in 1893, when it was made possible for "any person claiming to be interested under a deed, will, or other written instrument," to issue one "for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."⁵⁹ This Rule was framed to facilitate the determination of short questions of construction which can be examined, without affidavits, upon the instrument itself,⁶⁰ and it is not confined to cases where an action might be brought in respect of the instrument.⁶¹ This is useful when it is sought to ascertain, for instance, whether or not certain correspondence constitutes a contract between the parties.⁶²

This concludes the review of the revision of 1883. The innovations that stand out highest are the insertion of the summons for directions and the development of the originating summons, both emphasizing the importance of the work done at chambers. Those who look for general tendencies will note that three influences make themselves felt all through the codification. The first, and the one most foreign to the spirit of procedure at common law, is the continued increase of official control over the conduct of actions, as opposed to free liberty for the litigants to do as they see fit. This is manifested not only in the complete control over the progress of an action vested in the master before trial, and at trial in the judge, but in the right of the Taxing Masters,

⁵⁹ Order LIV A, Rule 1, which permits the summary use, in a proper case, of the power created in Order XXV, Rule 5; see note 42.

⁶⁰ *Re Nobbs*, [1896] 2 Ch. 830.

⁶¹ *Mason v. Schuppsisser*, 81 Law Times Reports, 147 (1899).

⁶² See *Von Hatzfeldt v. Alexander*, [1912] 1 Ch. 284.

at the conclusion of the controversy, to exercise their discretion in disallowing the costs of steps unnecessarily or negligently taken. Every application in the course of an action is considered by the officers of the court not in the abstract, but in relation to the subject-matter of the action, and their leave is a prerequisite to all but a very few steps that can be taken. The second influence represents a reversal of the common law practice in an opposite direction. In the early days of the King's courts pleadings were intended to inform the *court* of the exact issues between the parties; the refinements of pleading grew up on the court's passive willingness to let issues emerge out of the allegations recited to it by contending pleaders in antiphonal rivalry, and the stilted form which written pleadings eventually assumed was born of the tradition of care with which every statement in one's opponent's pleading had to be met to the court's satisfaction without disclosing to that opponent too much of one's own case. To-day the prime function of pleadings is to give the *parties* mutually full information as to the number and nature of the issues to be heard at trial. The game is now played with the cards on the table. A party is entitled to know before he comes into court with his witnesses the full extent of the case he must prove; and what is more important, he is entitled to know his opponent's line of attack sufficiently early in the litigation to decide whether or not it will be worth while to fight it out to trial. This tendency finds expression in the 1883 Rules in the increased power of the master to order, and of the parties to choose, that pleadings be dispensed with where the issues are clear, that when given they should contain full particulars, and that mutual discovery should be directed specifically to the parts of the case that will develop issues. The whole aim is to require the parties to give each other all the necessary information without superfluous parleying.

The third tendency is the decided bettering in the malleability of judgments. Instead of the old blunderbuss judgment deciding the whole litigation in favor of one side or the other, the court is now able to select issues and parties carefully from the entanglements of a modern business transaction and so to frame its judgment as to reach each interest individually and completely. This is aided in the Rules of 1883 by increased facilities for the severing of claims undefended and parties not defending from those in contest, for dealing finally with third parties whose liability is established in the original action, for the raising of counterclaims, and for weeding out the issues and parties in any action in respect of whom the opening of judgment or the granting of retrial would be just.

None of these three influences began with the Rules of 1883, which merely followed along the lines laid down in the Schedule to the Act of 1875. Indeed, together with the decline of trial by jury, they may be regarded as the distinctive contribution of the Judicature Acts towards the reform of civil procedure and the attainment of the ideal when civil process, instead of being, in the words of Lord Brougham, "a two-edged sword in the hands of craft and oppression," will become "the staff of honesty and the shield of innocence."

CHAPTER VIII.

THE RULES OF 1885.

Since 1883 no complete revision of the code of Rules has been effected by the Rule Committee, so that the "Rules of the Supreme Court, 1883," with their amendments, still express the adjective law of practice in the Supreme Court. Those amendments, however, are by no means small either in number or in importance. The Rule Committee has constantly endeavored to meet the wishes not only of the profession but of all parties interested, in altering inconvenient or inadequate portions of the Rules, so that not a year has passed since 1883 without the addition of a body of amendments to the Rules already in force. So frequently do changes come that the annotated editions of the Rules used by practitioners appear annually, and each year's book is somewhat bulkier than the last.¹ The amendments vary from a short sentence intended to explain a doubtful

¹ From 1875 to 1888 there appeared seven successive editions of Wilson: *Judicature Acts and Rules*, begun by Mr. (later the Rt. Hon. Sir) Arthur Wilson and carried on by him and others. In 1884 Thomas Snow began the *Annual Practice*, an annotated edition of the *Judicature Acts and Rules*, commonly known, from the color of its covers, as the *White Book*. It has appeared annually since that year, gradually growing in size; the 1916 edition contains over twenty-seven hundred pages. In 1899 an annual publication, which now rivals the *White Book* for popularity, was begun, called the *Yearly Practice*, or, colloquially, the *Red Book*. Its chief editor was Mr. M. J. Muir Mackenzie, one of the Official Referees; he was a joint editor of the Wilson book during its lifetime. The 1916 *Red Book* contains over twenty-five hundred pages. Both the *White Book* and the *Red Book* give copious annotations for every section of the Acts and Rules, citing thousands of decided cases.

phrase to whole Orders creating new methods of procedure. Three times, in 1885, 1893, and 1902, the Committee has, for special reasons, promulgated especially large batches of amendments, over one hundred and fifty Rules having been altered or added by the changes in those years alone; in some years only one or two Rules have been affected. Altogether nearly five hundred Rules have been altered or added since 1883.

It must not be supposed that this prolific activity has been viewed altogether with satisfaction by either the profession or the lay public. Every change in the Rules calls forth some protest. However eager some persons may be to persuade the Rule Committee to act upon their suggestions, others always raise their voices to let things stand as they are. It is left entirely to the Committee's discretion to balance the conveniences, and there is no doubt that for every suggestion it has followed it has rejected several, perhaps half a dozen, others. The fact is that new situations constantly arise which, if they were not provided for, would leave the Rules incomplete or inconclusive, so that the frequency of amendment appears to be a necessary evil.

An examination of the amendments made since 1883 reveals the fact that they were produced in response to a series of impelling causes whose wide variety bears testimony to the great adaptability and responsiveness of a procedure so contained. To trace the principal movements or concerted efforts for reform which they represent, the time from 1883 to the present may be conveniently divided into three parts, the most prominent episode in each of which was the issue of a set of Rules more numerous than those published in the average year. The three divisions centre about 1885, 1893, and 1902.

The chief work of the Rule Committee in the first of these three periods was to introduce changes to reform

chamber procedure in the Chancery Division of the High Court. The 1875 Rules did not extend to chancery practice, and in 1883 little more was done than to codify the scattered provisions of all the old Chancery Orders and statutes. But the development of the originating summons made chamber procedure in the Chancery Division a subject of the very first importance, and Lord Selborne determined to have it gone into and revised with the same thoroughness he had applied to the practice on the common law side through his Procedure Committee of 1881 and the subsequent revision.² In 1884, about a year after the R. S. C. 1883 had gone into effect, he appointed a committee of ten "to inquire into the subject of the existing rules as to the distribution of business in the courts and chambers of the Chancery Division, and the distribution of the clerical staff," at the head of which he placed Lord Esher, the Master of the Rolls.³ That committee, which became known as the Chancery Chambers Committee, heard evidence during November and December, 1884, from judges, registrars, taxing masters, and chief clerks in the Chancery Division, and also from prominent solicitors engaged in chancery work. The Incorporated Law Society laid before the Committee a series of recommendations

² It will be remembered that Lord Selborne's Legal Procedure Committee of 1881 was restricted, in its investigations and recommendations, to procedure in the Queen's Bench Division of the High Court.

³ The other members were Mr. (later Lord) Justice Kay, Mr. Justice Pearson, Mr. J. (later Mr. Justice) Stirling, Mr. M. Ingle (now Mr. Justice) Joyce, Mr. Horace (later Lord) Davey, Q.C., Mr. Frank (now the Rt. Hon. Sir Francis) Mowatt, C.B., Mr. Kenneth (now Lord) Muir Mackenzie, Mr. Henry Roscoe, and Mr. Thomas Marshall. At the time of its appointment, therefore, the Committee contained three judges, three barristers, two solicitors, one lay member of the civil service, and the Lord Chancellor's Secretary.

advocating the simplifying of the method of drawing up orders in chambers.⁴ On August 7, 1885, the Committee signed a Report for transmission to the Lord Chancellor together with a set of Resolutions proposing definite additions to the R. S. C. and changes in the organization of the Chancery Division.⁵

Principal among the conclusions it submitted was one favoring a rearrangement of chancery work which would assure to witness actions a favorable opportunity of continuous and unbroken hearing. That touched what had been the greatest obstacle to the prompt handling of chancery actions. It must be understood that the average action on the chancery side involves not only the hearing of issues, with or without witnesses, by the judge sitting in open court, but a considerable amount of chamber work in the course of which all preliminary or interlocutory applications are disposed of and decrees worked out after they are handed down; it is in chambers, rather than in court, that the distinctive machinery of the Chancery Division is seen in operation, performing the equitable administration and distribution of assets. It was the custom to assign each action in that Division to one of the five judges in it, who would thereafter have complete *seisin* of all proceedings in the action, and chamber applications in it would be heard by his own staff of clerks, acting as deputies for him. Frequently, however, parties, dissatisfied with the decision of the judge's chief clerk, would wish to have it reviewed by the judge himself; again, certain important chamber matters were reserved for the decision of the judge in person. For these cases the judge would have personally to sit in

⁴ These are enumerated in 29 Solicitors' Journal, 773 (October 17, 1885).

⁵ The Report was ordered printed by the House of Commons, March 29, 1886, and appears in Parl. Pap. 1886, liii, 127; also in full in 30 Solicitors' Journal, 518, 552 (1886).

chambers. To get time to do his chamber work, which was always heavy, a judge would either have to sit after four in the afternoon, wearied by a whole day of trial work in court, or simply cancel the trial work and sit for whole days exclusively in chambers. The latter course was the one most followed, with the result that there would frequently be breaks of several weeks together in the hearing of each judge's trial list of witness actions. Consequently it often happened that witnesses and parties were hung up for weeks at a time, without knowing just when they would be called upon to appear. How troublesome and expensive such delays were it is easy to understand.

What the Committee proposed was to appoint an additional judge to the Division, and then divide the six judges up into three sets of two each; each pair of judges would be given the power to handle actions assigned to either of them, and they would so arrange their time that while one sat in court the other sat in chambers; every week or month they would change about. There would thus be established in the Chancery Division three sub-Divisions, in each of which there would always be both a chamber judge and a court judge continually sitting. This plan, known as the "linked judge system," and adopted by the Chancery Chambers Committee after lengthy discussion of several expedients submitted to it with the same end in view, was first devised by Horace Davey, Q.C., one of the barrister members of the Committee, who later, as Lord Davey, sat in the Judicial Committee of the Privy Council. Its approval and subsequent adoption by the Rule Committee (though not until many years later⁶) enabled the judges in the Chancery Division so to clear off their

⁶ Order V, Rule 9A, November, 1900. The first linking took effect January 11, 1901.

arrears of work that to the present day that branch of the High Court, long notorious for its unconscionable delays, has always kept completely abreast of its trial lists and left far behind its former reputation for apathy and neglect.

Subjoined to the Report of the Committee was a series of Resolutions containing suggestions for minor improvements in the procedure before the chief clerks in chancery chambers and before the taxing masters. Most of these were adopted *verbatim* by the Rule Committee and issued as new Rules in 1885.⁷ Some useful changes they introduced were that accounts might be vouched in the offices of solicitors, only items for surcharge or contest being brought into chambers,⁸ and that the court might stay proceedings brought to demand an account from an executor or trustee, to give the respondent time to file the missing account and so save costs.⁹ Two of the new Rules, at least, trace back to the recommendations submitted to the Chancery Chambers Committee by the Law Society in 1884; one allowing counsel to be briefed to appear at the hearing of important applications in chambers;¹⁰ and another requiring all orders made in chambers to be drawn up by the chief clerk himself, except those to be acted on by the Paymaster.¹¹ An innovation introduced by the Rule Committee

⁷ The R. S. C. 1885 may be found in 30 Solicitors' Journal, 143 (December 26, 1885). They contain fifty Rules, of which thirty-two are taken from the Resolutions of the Chancery Chambers Committee.

⁸ Order XXXIII, Rule 4A, from Resolution 38 of the Report.

⁹ Order LV, Rule 10A, from Resolution 39 of the Report.

¹⁰ Order LV, Rule 1A, from Resolution 20 of the Report. This put an end to the diversities of practice at chambers amongst the various chancery judges.

¹¹ Order LV, Rules 74 and 74A, from Resolution 28 of the Report. Previously every order of a chief clerk had to be formally drawn up by the registrars, just as is now done with judgments rendered in open court.

apparently on its own initiative was to extend the originating summons to proceedings on foreclosure and redemption of mortgages; these have now become a very large proportion of the instances in which the originating summons is applied.¹² The R. S. C. 1885 also included eight Rules on procedure before the taxing masters,¹³ and nine Rules to unify the three or four methods of appeal previously in use from inferior courts to the High Court.

Another peculiarity of the distribution of duties in the Chancery Division that came in for close attention soon after 1883 was the relation between the functions of the chief clerks and those of the registrars. The office of a chief clerk has been described above; he sits in the chambers of the judge to whom he is attached, to dispose of all applications made to the judge which do not have to be made in open court; a few matters are excepted from his powers, either by the Rules or by the judge's personal direction, and must be heard by the judge in person. Two chief clerks are attached to each chancery judge, and each chief clerk has under him a staff of subordinate clerks who do all the clerical work involved in the accounts and inquiries which form so large a part of the business in chambers. The chief clerk is a sort of deputy for the judge, so that orders made by him are supposed to be made by the judge himself. Dissatisfied parties may ask the judge to review his chief clerk's decision by merely "adjourning the summons" to be heard by the judge. The judge will not as a rule, however, vary his chief clerk's certificate, as each chief clerk knows pretty well how his judge will act; if he is in doubt, he will of his own motion adjourn the summons to the judge. Since 1897, the chief clerks are styled "masters," though no change whatsoever in their duties was made

¹² Order LV, Rule 5A.

¹³ Order LXV, Rules 19 A to H, from Resolution 40 of the Report. Most of these were altered, however, in 1889.

by the change in title. The registrars, on the other hand, are officers whose duty it is to draw up the orders and judgments pronounced by the court. There are twelve registrars, and each one sits each day in a different court either in the Chancery Division or in the Court of Appeal, according to a rota. Decrees in the Chancery Division are far more complicated than the judgments on the common law side, and require to be drawn up with great precision, having regard to all the interests affected — for instance, in the distribution of a fund — and to all the documents and facts upon which the court is moved to act. “It may look to an outsider a curious thing,” said a witness before the 1884 Chancery Chambers Committee, “that an order of the court should be a complicated matter, but I know few things that are more complicated. . . . The registrars are a body of men trained up from their youth in orders.” When the order is one pronounced in open court the registrar bases his draft on his own notes and on the information furnished him by the opposing solicitors, who must appear before him for that purpose. If it is one delivered in chambers, the registrar draws it up from the master’s notes.¹⁴ Another witness explained, before the Committee: “In all orders made on proceedings in chambers the *materials* are supplied by the chief clerk (master) and the *form* is supplied by the registrar. . . . The chief clerk’s note for the order may be about twenty words, and the order may be about fifty folios.” Besides these two classes of semi-judicial officers there is a third whose powers are equally great — the taxing masters. As their title indicates, they have the power to ratify bills

¹⁴ See Daniell: Chancery Practice (8th ed., 1914), vol. 1, c. xv, “Judgments and Orders”; also article on “Registrars,” in Encyclopædia of the Laws of England. It ought to be mentioned that these “notes” are important, in the absence of stenographic reports of proceedings.

of costs delivered at the conclusion of a controversy, to cut down charges made or to strike out items, and to protect parties from overcharging by either their own solicitors or their opponents'. Formerly there were separate taxing masters for each Division of the High Court, but in 1902 they were all consolidated into one office which performs the taxation for all Divisions, the work being distributed among twelve masters according to a rota.¹⁵

One of the Resolutions of the Chancery Chambers Committee proposed that there should be some effort to do away with the distinctions between these three classes of officers in the Chancery Division, but the only action in that direction taken by the Rule Committee in 1885 was to order that thereafter the chief clerks should themselves draw up most of the chamber orders instead of sending them to the registrars. In May, 1887, Lord Halsbury was persuaded to appoint a committee to consider a possible amalgamation of the offices of registrar, chief clerk, and taxing master in the Chancery Division,¹⁶ but the report of that committee only brought out the inadvisability of any such amalgamation. The technical training required for the registrar's work was the strongest argument against throwing his duties on to the chief clerk; and the impartiality necessary in a taxing master showed how unwise it would be to give his powers to the chief clerk. Mr. Justice Pearson testified before the 1884 Committee:

"It is, in my judgment, a great advantage that the taxing masters are entirely separated from all matters, in respect of which they have

¹⁵ The chief clerks (masters) in judges' chambers and the taxing masters are always ex-solicitors; the registrars are drawn from the Bar. The salary of all three offices is about £1500 per annum.

¹⁶ The Committee was composed of Mr. Kenneth (now Lord) Muir Mackenzie, the Lord Chancellor's Secretary; L. L. Pemberton, a registrar; Charles Burney, a chief clerk; John V. Longbourne, a taxing master; and two others. Its report has never been published.

to tax bills of costs, in their earlier stages. They are thus kept independent and impartial, and no solicitor need fear their being prejudiced by any opinion they have formed in the progress of the litigation."

In 1889 there occurred an event which throws an interesting side-light on the way new Rules can be adapted to pressing circumstances by the rule-making authority. In May of that year, Mr. Justice Kay, who was well known for his disposition to cut down the costs allowed to solicitors wherever possible, was a member of the Rule Committee and procured the passage of the following addition to the Order on costs:¹⁷

"If, in any case in which a taxation is directed with a view to the payment of the costs out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the costs shall have been increased by unnecessary delay, or by improper, vexatious or unnecessary proceedings, or by other misconduct or negligence, or if from any other cause the amount of the costs shall, in the opinion of the taxing master, be excessive, having regard to the value of the fund, estate, or assets to which they relate, or other circumstances, the taxing master shall allow only such an amount of costs as would, *in his opinion*, have been incurred if the litigation had been properly conducted, and shall assess the same at a gross sum, and shall (if necessary) apportion the amount among the parties."

This was an attack upon the solicitors too obvious to permit of its being overlooked, and on May 17, 1889, a meeting of solicitors at the Law Society passed a resolution "that the Council be requested to take immediate steps for obtaining a suspension, pending a revision, of the Orders of May, 1889." A week later the Council presented a report protesting strongly against the arbitrary wording of the new Rule. They said: "If the words of the regulation do not in terms preclude an appeal, they practically make an appeal impossible, place the taxing master in a position of irresponsibility unknown

¹⁷ Order LXV, Rule 27 (38A), to establish the practice approved of in *Brown v. Burdett*, 40 Ch. Div. 244 C. A. (1888).

to any other tribunal in the country, and override all Acts of Parliament, rules of court and decisions.”¹⁸ A few weeks later¹⁹ the Rule Committee, impressed by the intensity of the opposition it had aroused, but still convinced that the regulation was right in principle, issued an amendment striking out the words “in his opinion” from the body of the Rule, and adding to its end:

“The provisions as to the *review* of taxation shall apply to allowances and certificates under this Rule,”

thereby acceding to the solicitors’ demand for a right to appeal. In 1902 the Rule was extended to apply to *any* taxation, instead of only to cases where costs are payable out of a fund. It is liberally interpreted, however, and its application has not been frequent enough, since its author’s death, to be a source of active worry to practitioners.

Two statutes passed near the end of this first period had an important effect on practice in the High Court — the County Courts Act, 1888, and the Arbitration Act, 1889. The former consolidates Acts providing for the remission from the High Court to a County Court of practically all actions where the sum in dispute is under £100²⁰; the latter prescribes the procedure to be followed in arbitrations and in putting in contest the sufficiency or validity of arbitrators’ awards.²¹

¹⁸ The full report appears in 33 Solicitors’ Journal, 495 (June 1, 1889).

¹⁹ June 24, 1889.

²⁰ 51 & 52 Vict., c. 43. The limit was raised from £50 to £100 by an amendment in 1903.

²¹ 52 & 53 Vict., c. 49.

CHAPTER IX.

THE RULES OF 1893.

The second period, from 1890 to 1897, was marked by the issue of an important set of new Rules in 1893, the enactment of several statutes altering the constitution of the rule-making authority, the creation of a commercial court by the judges themselves without the aid of either Parliament or the Rule Committee, and an attempt (which failed of completion) to introduce a revision of the code formed by the R. S. C. 1883 and their numerous amendments.

Over one hundred Rules had, by 1890, been added to the original text of 1883 or subjected to some alteration; in addition, successive Judicature Acts, in 1884, 1887, 1888, and 1890, had patched up small leaks in the previous ones, so that the old inconvenience of having to search in a dozen places for the correct practice was once more felt and, as before, gave rise to agitation for a revision of the Rules. In February, 1890, Thomas Snow, the founder of the "Annual Practice" (the White Book), and then its editor, addressed a letter to the Council of Judges pointing out that one-fifth of the sections of the Judicature Act, 1873, had been replaced, altered, or suspended, that nearly all the thirty-five sections of the Judicature Act, 1875, had been amended or repealed, wholly or in part, and that about ten of the twenty-five sections of the Appellate Jurisdiction Act, 1876, had been similarly dealt with.¹ He suggested there should be a codification of all the Acts on judicature, with a view

¹ The substance of the letter is quoted in 34 Solicitors' Journal, 244 (February 15, 1890).

to placing all the sections on court organization in one Act, and all those on jurisdiction and procedure in another; to accompany this he urged the necessity for a revision of all the Rules of Court, citing the fact that over four thousand decisions had been handed down upon them since their birth. What impression was made on the rule-making body by this letter does not appear to be recorded. A few months later, in April, Mr. Snow, full of his subject, wrote again, confining himself this time to pointing out contradictions in the Rules made by the Committee for the operation of the new Arbitration Act, 1889.² No sign was given by the Rule Committee in response to this, as to its attitude on the question, but on July 17, 1890, Lord Esher, the Master of the Rolls, one of the eight judges who then composed the Committee, moved in the House of Lords for a Commission to look into the administration of the law under the Judicature Acts. He laid especial emphasis upon the abuse of summonses for discovery and interrogatories, the old trouble that had been complained of to Lord Selborne's Committee as far back as 1881. Although he was supported in his argument by Lord Herschell, the motion was dropped upon the opposition of the Lord Chancellor (Lord Halsbury), who expressed the view that the Rule Committee had ample powers to make any necessary changes.³ In spite of this assurance, no action was taken, and in the Lower House, nearly a year later, Mr. Atherley-Jones had an evening set aside to discuss a similar motion, but it failed to attract a quorum.⁴

² The letter appears in full in 25 Law Journal, 268 (May 3, 1890).

³ The debate is reported in Hansard, 3d ser., vol. 347, cols. 32-65 (1890).

⁴ Now His Honour Judge Atherley-Jones, K.C., Judge of the City of London Court. A speech favoring the motion was prepared by Mr. Pitt-Lewis, Q.C., but never delivered. It appears in 91 Law Times, 122 (June 13, 1891).

Though nothing came of these formal efforts to get something done the judges were obviously restless under the constant criticism of their failure to improve matters, and in December of 1891 Lord Justice Bowen and Mr. Justice Mathew, whose vigor and enterprise had considerably enlivened the work of the 1881 Procedure Committee of which both had been members, addressed a letter to Lord Coleridge calling his attention to many points in the working of the judicature system which were in need of investigation and amendment. The Lord Chief Justice, in turn, in a correspondence which was later made public,⁵ emphasized anew to the Lord Chancellor the need for action which was earlier asked for by Lord Esher in Parliament, and pointed out that the proper course would be to call together a Council of all the judges, under section seventy-five of the Act of 1873, without further delay. To this Lord Halsbury assented and he ultimately fixed on June as the most convenient time for the meeting. Although the Act requires that an annual Council should be held, no such meeting had been called since 1884, so that the section was '(and is to-day) practically a dead letter and the judges were not expected to accomplish very much under its auspices.'⁶ But more things seem to happen when not very much is expected.

There was no lack of material for the Council to work upon. During the five months before it met there were submitted to it resolutions from the Law Society and

⁵ It appears in 92 *Law Times*, 163 (January 9, 1892).

⁶ 36 *Solicitors' Journal*, 158 (January 9, 1892): "Probably the true remedy for the present state of things in the Supreme Court is to be found in another direction entirely. . . . It would be an obvious reform to place the management of its business under the control of a Minister of Justice, less ornamental but more useful than the Lord Chancellor, who would be responsible for its due conduct to Parliament." An interesting advocacy by Mr. Thomas Snow of the creation of a Ministry of Justice appears also in 16 *Law Quarterly Review*, 129 (1900).

the Bar Committee and suggestions from many individuals. In February Mr. Snow once more sent to the judges a communication strongly advocating a complete revision of the Rules and giving specific examples of weak spots that ought to be repaired,⁷ quoting Lord Campbell's expression that "the due distribution of justice depends much more upon the rules by which suits are conducted than on the perfection of the code by which rights are defined." A small committee of judges, appointed to draft resolutions upon which the full Council could agree, drew up one hundred and one resolutions covering all the reforms being asked for, and some of the judges wrote out lengthy criticisms of these Resolutions which were also laid before the Council.⁸

For three days, the seventeenth, the twenty-first, and the twenty-third of June, 1892, the Council in formal meeting considered and debated all these recommendations and concluded by adopting a series of one hundred Resolutions advocating changes in the arrangement and conduct of the High Court's business.⁹ The Report includes comment on and definite proposals for changes in the circuit system, interlocutory applications for discovery and judgment, fixing of place of trial, creation of a commercial court, chamber work in the Chancery Division, taxation and payment of costs, and the allowing of appeals. Many of these are taken from the recommendations made by the Law Society in March — a fresh evidence of the keen and intelligent interest the

⁷ Printed in 27 *Law Journal*, 104 (February 6, 1892). He also published an article in 8 *Law Quarterly Review*, 129 (1892), in which he developed a boldly original scheme for an entire reorganization of the judicature.

⁸ Those of Mr. Justice Cave are printed in 93 *Law Times*, 375, 402 (1892).

⁹ They appear in full in 36 *Solicitors' Journal*, 716 (August 13, 1892). For an account of Lord Bowen's work upon these resolutions, see his "Life," by Sir H. S. Cunningham (London, 1897), p. 173.

solicitors as a body have always taken in the reform of procedure.¹⁰ On the whole, the Report was received with great favor in legal circles,¹¹ and the breadth of its scope was regarded as testifying to the desire of the Bench as a whole to maintain the efficiency of every department of the court's procedure. But no mention was made in it of the codification of already existing Acts and Rules for which there was such a strong demand, and this omission was adversely criticized.¹²

Before Lord Halsbury could make any use of this Report the general election of 1892 retired his party from office and Lord Herschell resumed his place on the woolsack. His return opened up a period of real activity in the progress of procedural reform. He first asked the Bar Committee and the Council of the Law Society to give him an official expression of the views of the two branches of the profession on the Report of the judges. By the close of the year these were in his hands¹³ and he was able to submit to the Rule Committee a definite

¹⁰ At the Annual Provincial Meeting of the Incorporated Law Society at Norwich in 1892 no less than three speeches were made analyzing the Report of the Council of Judges, and comparing it with the recommendations submitted by the Law Society in 1882 and 1892. They are printed in 36 *Solicitors' Journal*, 805 (Mr. Richard Pennington, President), 813 (Mr. John Hunter), and 815 (Mr. E. K. Blyth).

¹¹ Articles from the *Saturday Review*, the *Liverpool Post*, the *Dublin Freeman's Journal*, the *Notts Guardian*, and the *Glasgow Herald* are reprinted in 93 *Law Times*, 430 (September 17, 1892).

¹² See articles on "The Judges' Report on Practice," in 8 *Law Quarterly Review*, 289 (1892).

¹³ The report from the Bar appears in 94 *Law Times*, 183 (December 24, 1892); that from the Law Society in 37 *Solicitors' Journal*, 159 (January 7, 1893). This effort at co-operation was characteristic of Lord Herschell's attitude toward the subject, and was appreciated. A writer in 37 *Solicitors' Journal*, 57 (November 26, 1892) said: "The request shows that we have now got a Lord Chancellor who recognizes that the criticisms of both branches of the profession are of

program for the formulation of new Rules, based on the advice of the judges and elaborated by the technical criticisms of solicitors and barristers in active practice. Discussion in the Committee continued over several months and at length, soon after the close of the Long Vacation in November, 1893, a batch of over sixty Rules was signed and published, carrying into effect many of the reforms which had been under consideration. In the main the Rules of November, 1893, deal with six topics, all of which figured in the discussions of the Council of Judges. They are the service of process outside the jurisdiction, summary judgment in liquidated claims, the summons for directions, discovery, originating summonses, and the curtailment of pleadings.

As to the first, the power of English judges to order service of writs outside the jurisdiction was extended to include originating summonses.¹⁴ When this became known, the Scotch members in the House of Commons, for some reason, thought it a reflection on their Scotch courts that domiciled Scotchmen should be liable to be made involuntary parties to litigation in England. In point of fact, the new Rule simply extended a recognized practice, and applied equally not only to Scotland but to all places outside England. But the Scotch members plied the Front Bench with questions until on January 11, 1894, the Rule Committee issued a new Rule marked "urgent" annulling the 1893 Rule on service of originating summonses out of the jurisdiction, and it has never been reinstated.

The procedure on recovery of summary judgment on liquidated claims was rendered more flexible by making

value with regard to a scheme framed by judges, and who may be relied on to consider and give full weight to every reasonable suggestion."

¹⁴ Order XI. The R. S. C. 1893 are printed in full in 38 Solicitors' Journal, 72 (December 2, 1893).

it possible for a plaintiff to strike out of his writ any claims which, on the hearing, appear to be improperly classed as liquidated¹⁵; and the procedure was made highly effective by the creation of a new trial list, known as the "Short Cause List,"¹⁶ on which short actions for summary judgment can be placed and disposed of at once if a trial is necessary. The success of that list proves that nothing will so completely take the heart out of the average defence in an action where the claim is for a liquidated amount as the prospect of an immediate trial. Sir F. Pollock remarks: "Remembering that in England, at any rate, the majority of actions are undefended, we cannot doubt that Order XIV is among the most beneficent inventions of modern procedure."¹⁷ In considerably more than half the cases which fall into this category defendants of recent years, though entering appearance, have failed to apply for leave to defend. The summons for directions was extended to all actions except those assigned to the Chancery Division, but it was still left optional.¹⁸ It was not until 1897 that it was made compulsory and extended over chancery actions as well.¹⁹

Interlocutory applications, especially for leave to obtain discovery of documents and to administer interrogatories, had always, since 1875, been the *bête noire* of procedure reformers, and the new regulations made in Order XXXI by the R. S. C. 1893 seem to be the most satisfactory arrangement that could be arrived at, since they have remained unaltered ever since. The principal change they made is that, though interrogatories may be delivered in any case, the leave of a master must first

¹⁵ Order XIV, Rule 1 (b).

¹⁶ Order XIV, Rule 8 (b).

¹⁷ *Genius of the Common Law* (New York, 1912), p. 83.

¹⁸ Order XXX, Rule 1.

¹⁹ R. S. C., May, 1897.

be obtained and he must approve the specific questions to be asked; he may, if he considers proper, alter their number, extent, or form.²⁰ Discovery of documents was made less of a burden to suitors by a new provision that where the documents to be inspected are business books or entries verified copies will suffice, provided mention is made in the affidavit of any erasures, interlineations or alterations in the original. On another point, it was always the rule (as it is now) that the "affidavit of documents," stating in separate schedules what relevant papers a party possesses and for which of them he claims privilege from inspection, is "conclusive" — that is, that the party's opponent must accept it as true and cannot cross-examine upon it. But that conclusiveness was made less formidable by two new Rules of 1893, one of which allows the master to order a party to state whether he has or had any *specific* document which his opponent makes oath he believes to be in the party's possession, and the other of which permits the master, where, on an application for an order for inspection, privilege is claimed for any document, to inspect the document for the purpose of deciding as to the validity of the claim of privilege.²¹

An important addition to the powers of the court was made in an extension of the originating summons, under which, by the new Rule, any person claiming to be interested under an instrument in writing, may apply for the determination of any question of construction arising thereunder, and for a declaration of his rights.²²

Lastly, the Rule Committee paid their respects to a difficulty which had puzzled them for many years. Ever since Lord Selborne's Procedure Committee of 1881 had

²⁰ Order XXXI, Rules 1 and 2.

²¹ Order XXXI, Rules 19A (1), (2) and (3).

²² Order LIV A. This is described in Chapter VII, with originating summonses.

recommended the complete abolition of pleadings the question of how to lessen the expense and delay of bringing the parties to issue had always been the first one discussed in any argument on procedural reform. Despite the improvements of 1883 in this regard, litigation was slowly drifting away from the courts into the hands of boards of arbitration; in fact practically every business contract contained a clause binding the parties to submit any dispute arising therefrom to arbitrators, and the Arbitration Act, 1889, was passed to provide a uniform mode of procedure in the innumerable small arbitrations that were constantly going on. The chief complaint against the law courts voiced by business men was (and still is) that they never knew, after an action was commenced, how long it would take to finish it or when the trial would occur, whereas in arbitration they fixed on a time and place for the hearing satisfactory to all parties and the thing was over without uncertainties to cause them worry. To win back to the courts the suitors who were thus turning their backs upon the judges, the Rule Committee invented a new procedure called "proceeding to trial without pleadings," and enshrined it in the R. S. C. as Order XVIII A. It provides that in any case where he chooses to do so, the plaintiff may indorse on his writ "a statement sufficient to give notice of the nature of his claim or of the relief or remedy required in the action," and a further notice "that if the defendant appears, the plaintiff intends to proceed to trial without pleadings." Thereupon the defendant may either insist that there should be pleadings and obtain the leave of a master for them, or give mere notice of any special defences and allow the action to be entered for trial. The intention of the Rule Committee was to provide a speedy conclusion, analogous to the summary judgment under Order XIV procedure, for claims which, though simple, were not liquidated and could therefore

not obtain the benefit of Order XIV by being specially indorsed. Laudable as that intention was, the design has failed utterly of accomplishment. Order XVIII A has never found favor with litigants and is now, for all practical purposes, useless. In the beginning it caused a great deal of confusion by being confounded with Order XIV; solicitors would add to a special indorsement under Order III, Rule 6, a notice under the new Order, for trial without pleadings, so that their applications for summary judgment put them in the position of asking for judgment *without* a trial, in the same breath with which they were asking *for* a trial without pleadings. But after that was cleared up, plaintiffs were not attracted by the possibility of going to trial without an inkling of the defendant's case, and practically no one was hardy enough to take such a risk in exchange even for the elimination of delay.²³

It was obvious to those familiar with the situation that Order XVIII A was an attempt to provide distinctive treatment for commercial causes without arousing Lord Coleridge's firm opposition to anything that would savor of the creation of a separate court for them. He was "entirely opposed to a change which involved the suggestion that all the members of the Bench were not equally fit to cope with every subject of litigation. He thought that all judges were, or ought to be considered, capable of dealing with all classes of cases,"²⁴ and it was his objection that rendered futile the long continued effort to set up a separate court or list for commercial cases. As far back as 1874, the Judicature Commis-

²³ There appears to be only one reported case in twenty-one years interpreting the Order: *Greene v. St. John's Mansions*, 35 Weekly Notes, 9 (1900). No others are cited in the 1916 Red Book or White Book.

²⁴ From p. 13 of Mr. Theobald Mathew's: *Practice of the Commercial Court* (London, 1902).

sioners in their Third Report definitely recommended that mercantile trials should be before a judge assisted by two skilled mercantile "assessors," instead of before judges either alone or with juries whose knowledge of technical commercial matters was superficial.²⁵ But the proposal was disregarded by the authors of the first Judicature Acts and nothing was done to provide specially for mercantile cases except to continue the old sittings at the Guildhall, where actions were tried with special juries from the City of London. These, however, were discontinued when the new Law Courts building at Temple Bar was opened in 1882, and then the merchants became even more impatient of the delays of justice, and more wedded to the practice of informal arbitration of disputes. But arbitration has its disadvantages — at best it is good to settle only disputes of fact; where the dispute involves a point or points of law the umpire's award is frequently incomplete or unsatisfactory. "For real acrimony and dispute," says a prominent London solicitor, "give me a friendly arbitration where there is a difference on the law." There were, therefore, frequent efforts to persuade Parliament or the Bench to provide special facilities for the trial of commercial actions by Her Majesty's judges. In June, 1888, a special joint committee from the Law Society and the Bar presented to the Lord Chancellor a report which was in effect an official petition from the profession for the creation of a separate commercial list. In response to this Lord Halsbury, in 1891, caused to be passed an Act to revive the Guildhall Sittings, in the belief that if trials were once more held within the precincts of the City itself, the City merchants could be persuaded to come back to

²⁵ Parl. Pap., 1874, XXIV, Reports from Commissioners, xiii. The minutes of evidence relating to tribunals of commerce in Continental countries are a rich mine of information for comparative purposes.

the court.²⁶ But this geographical concession quite overlooked the root of the difficulty — the delays and uncertainties of the trial list — and the new move was a failure from the start. The Act has never been repealed, but the Guildhall Sittings were soon abandoned. In January, 1892, a joint committee of the Law Society and the Bar, in submitting resolutions to the Lord Chancellor (to be laid before the Council of Judges Lord Halsbury had been moved to call), repeated the petition of the 1888 committee, expanding it into a definitely outlined scheme for the disposal of cases of a mercantile character in a separate list,²⁷ and the Report issued by the Council of Judges in June contained eight Resolutions favoring the adoption of the scheme.²⁸ Their plan included the assignment of all mercantile cases to two judges who would hear them independently of the general trial list, and the establishment of a special jury panel of mercantile men for the new list — a kind of modern version of Lord Mansfield's famous jury of merchants. But the Commercial List was one of the Council's suggestions which the Rule Committee refused to adopt in 1893, probably because of the Lord Chief Justice's well-known antagonism to it.

A few months later, in May, 1894, the judges of the Queen's Bench Division, under the power conferred upon them by the Judicature Act to make arrangements among themselves for the disposal of business coming into the Division, issued a set of resolutions to regulate the composition of the trial lists,²⁹ and in that document they inserted one resolution to the effect "that it is desirable

²⁶ The Judicature (London Causes) Act, 1891, 54 & 55 Vict., c. 14.

²⁷ Printed in 36 Solicitors' Journal, 203 (January 23, 1892).

²⁸ Resolutions 32 to 39. Printed in 36 Solicitors' Journal, 719 (August 13, 1892).

²⁹ These appear in the Red Book and the White Book; also in 38 Solicitors' Journal, 528 (June 9, 1894).

that a list should be made of Commercial Causes to be tried at the Royal Courts of Justice by a Judge alone, or by jurors summoned from the City." But it is significant that of the three names of Queen's Bench judges not among those subscribed to the resolutions, one is that of Lord Coleridge, the Lord Chief Justice, and that may explain why nothing was done in pursuance of this part of the resolutions.

In June, 1894, Lord Coleridge died, and was succeeded by Lord Russell of Killowen. The new Lord Chief Justice did not share his predecessor's feelings about the Commercial List, and, assured of his support, Mr. Justice Mathew and Lord Justice Bowen, who, from the beginning, had been the most earnest advocates of the new departure, perfected the arrangements they considered necessary to inaugurate the List.³⁰ In February, 1895, there was issued the famous "Notice as to Commercial Causes," which finally gave it birth.³¹ The system it established is so simple that it required no alteration in any Act of Parliament or Rule of Court, and accomplished its object merely by giving full exercise to powers already possessed by the judges. One judge is designated to hear commercial causes, which are loosely defined as "causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and commercial agency, and mercantile usages." A separate list is kept of such causes, called the Commercial List, in which

³⁰ For a different account of the origin of the Commercial List attributing it to Mr. Justice Gorell Barnes, see 9 *Law Quarterly Review*, 373 (1893); E. S. Roscoe: *The Growth of English Law*, (London, 1911) p. 185; and Sir. F. Pollock: *The Genius of the Common Law*. (New York, 1912), p. 61.

³¹ This is also in the Red Book and the White Book; also in 39 *Solicitors' Journal*, 245 (February 9, 1895).

actions can be entered only by leave of the judge for the time being taking the List. Once entered in that List, the summons for directions and all interlocutory applications in the action are heard by the judge himself and not by a master. The List is independent of the general trial lists, so the judge devotes his entire attention to it at all times until every action entered in it has been heard. Furthermore, in disposing of interlocutory applications in this List he exercises to the full the powers conferred in the Rules to eliminate pleadings, to restrict discovery, to relax the strict rules of evidence, and to save expense at every turn. As a consequence the List is never in arrear and parties enjoy the great benefit of being able to have a day certain appointed for the trial which is mutually convenient.³²

Part of the undoubted success of the Commercial List and its reputation for speedy procedure must be ascribed to the fact that comparatively few cases are entered in it.³³ If all the actions begun in the King's Bench Division could be given the same attention by the judges it is certain that arrears would be a thing of the past in every List as well as in the Commercial.³⁴ Nor

³² The history and practice of the Commercial "Court" are fully described in *Practice of the Commercial Court* (London, 1902) by Mr. Theobald Mathew, a son of the late Lord Justice Mathew, who was the first judge to take the List and who established the precedents for its efficiency. The best short account of the court is by Dr. T. Baty, in *Commercial Laws of the World*, vol. 13, p. 71.

³³ In 1912 (the last year for which figures are available) there were altogether 358 summonses for directions in the Commercial List, out of a total of 60,826 proceedings of all kinds begun in the King's Bench Division — about one-half of one per cent. — so it is apparent that it is not phenomenal if one out of eighteen judges can keep the List free of arrears.

³⁴ In fact, there was complaint from the very start that commercial suitors should get better treatment from a judge than other litigants. "The greater the success of the Commercial Court the more

has it had the effect of winning back to the Law Courts disputes that were going to arbitration. The number of arbitrations is considered by competent authorities to be as large as ever. Sir John Macdonell, the King's Remembrancer, in the Civil Judicial Statistics for 1912, speaks of "the large and probably increasing amount of disputes which are determined by arbitration. Many trades," he says, "have completely organized systems of arbitration for the settlement of disputes relative to quantity and quality of goods and as to the performance generally of mercantile contracts." And again, "It is more and more the practice to introduce an arbitration clause into contracts, with the result that disputes are determined outside the Courts." It must not be overlooked, however, that the Commercial List does provide a forum where those who choose can obtain a speedy judicial decision upon differences arising out of contracts such as those for insurance or for carriage by sea — perhaps the two greatest business activities in England.

Soon after the publication of the Rules of 1893, Lord Herschell turned his attention to the larger problem which had, for the moment, been put aside — the problem of revising and codifying the Judicature Acts and Rules to relieve them of their weaknesses in form. The letters of Mr. Snow had stirred up a good deal of publicity in favor of revision; in October, 1892, the Times had asserted that revision was an urgent need; and it was generally acknowledged that the Rules were "thickly strewn with pitfalls for the unwary practitioner."³⁵ Lord Herschell had considered it imperative to introduce the new provisions before attempting revision, and to that end he first completed the work that resulted in the changes of 1893; that much out of

unfair does its existence become towards all suitors who for good or bad reasons are excluded from it."

³⁵ 37 Solicitors' Journal, 4 (November 5, 1892).

the way, he and the Rule Committee returned, early in 1894, to the consideration of ways and means for the task of revision. The result was to appoint Lord Justice Lindley and Mr. Justice Charles (whose place was later taken by Lord Justice Kay) a sub-committee to proceed at once with the actual work of revision, and the two judges began without delay. The profession were delighted to hear that the work was under way, not only for the reasons they had given expression to before, but because the unexampled activity of the Rule Committee during the preceding year had made them weary of amendments and they hoped a thorough revision would give them a respite of several years from further changes.³⁶ The sub-committee gave a great deal of time to the work, frequently going so far as to suspend the sittings of their branch of the Court of Appeal, but before they had gone very far into the labor of digesting the huge mass of Rules they decided it would be impossible for them to complete the revision unaided and they were authorized to delegate the details of draftsmanship to experts employed for the purpose. Mr. Snow, the editor of the White Book, was put in charge of the actual drafting, associated with him being Mr. Francis A. Stringer, the Head Clerk of the Writ, Appearance and Order Department in the Central Office of the Supreme Court, and Mr. W. Wills.

For over two years, the revisers toiled away at their compilation. In August, 1896, the sub-committee was able to place before the Rule Committee for confirmation a new code of Rules, completely ready for service. When this fact was published, it was generally assumed that the new revision would be adopted as of course,

³⁶ 39 Solicitors' Journal, 5 (November 3, 1894): "It is greatly to be hoped that any such revision will have something of the character of finality about it, and that we shall enjoy a period of rest from the constant changes which bewilder and confuse practitioners."

and that the "R. S. C. 1896" would replace the old Rules of 1883. But for some reason the approval of the Rule Committee was withheld. It was at first thought that there was merely a delay about formally signing the new Rules, but gradually it became understood that differences had arisen as to the acceptability of parts of the revision, especially where it departed from strict codification to venture into novelties untried, and that the whole thing would be dropped. It is certainly the case that the 1896 revision was not conducted under that close personal supervision which Lord Selborne, Lord Coleridge and Sir George Jessel bestowed on the revision of 1883. Lord Herschell went out of office soon after it was begun; Lord Halsbury, when he returned to the Lord Chancellorship in 1895, was not personally interested in the enterprise; and Lord Russell of Killowen was inclined to allow the sub-committee and their advisers a free hand to work out the revision unhampered. At all events, when the revision was completed it was found to contain matters to which the approval of the more influential members of the Rule Committee could not be extended, and although no formal action was taken on the subject and no decision was ever published, the revision never emerged from the Committee's consideration and has never been heard of since. Such was the fate of the only official attempt at revision since 1883.³⁷

Before Lord Herschell was removed from the custody of the Great Seal by the General Election of 1895, he succeeded in completing certain statutory reforms affecting the Rule Committee, for which the demand was

³⁷ A letter from Mr. Snow to the editor of the Solicitors' Journal (45 S. J. 97, December 8, 1900) is the only stone that marks its grave. He and his colleagues, he says, "completed the task after two years and eight months very hard work. It was approved by the sub-committee and printed and sent to all the judges. There the matter remains."

just as insistent as that for the changes in the Rules themselves. The most important of these was the Rules Publication Act, 1893, which imposed upon the rule-making authority the duty to give due notice in public form to their intention to make new Rules.³⁸ During the life of the first code of Judicature Rules (1875-83) there was frequent complaint about the absence of such a requirement; in some cases the Rule Committee actually issued new Rules of which the profession had no knowledge until after the date fixed for their taking effect. After 1883, although the delays in publication were not so marked as before, practitioners had no means of knowing officially that new Rules were in process of incubation. Only after they were actually signed would a notice be published that they were to go into effect at a certain date, usually the beginning of the next sittings of the court. No opportunity was offered for public discussion or for criticism by those likely to be most intimately concerned. In the debate on the 1883 Rules in the House of Commons, Lord Halsbury (then Sir Hardinge Giffard) inveighed eloquently against "this silent and secret mode of altering the law."³⁹ In the Report of the Law Society's Committee of 1889, protesting against Mr. Justice Kay's new Rule on costs of that year, appears this paragraph:

"These Rules . . . were signed without any previous communication with the profession, and the committee desire that attention should once more be called to the importance, both in the interests of the public and for the convenience of the profession, of a sufficient opportunity being afforded to the representatives of the profession for the consideration *in draft* of any proposed rules."⁴⁰

Thereafter the Council of the Law Society worked unremittingly for recognition by Parliament of this

³⁸ 56 & 57 Vict., c. 66.

³⁹ Hansard, 3d ser., vol. 283, col. 151 (August 11, 1883).

⁴⁰ 33 Solicitors' Journal, 496 (June 1, 1889).

necessity. In February, 1890, the President of the Society announced at the annual meeting "that the Council have prepared a Bill for introduction into Parliament providing that new Rules of the Supreme Court and of the county courts should be published a specified time before they are finally sanctioned, so as to afford opportunity for suggestions," and that Bill, known as the Statutory Rules Procedure Bill, was read for the third time in the House of Commons on August 1, 1891, but got no further. In the following session Sir Albert Kaye Rollit, a prominent member of the Council, again introduced the Bill, and this time, with Lord Herschell's assistance, both Houses gave it approval, and it received the Royal Assent December 21, 1893, as the Rules Publication Act. It applies not only to Rules of the Supreme Court but to all statutory rules made under the sanction of Acts of Parliament—an ever increasing body of legislation—and requires that they shall be published in draft in the Gazette forty days before being finally signed. During that time interested parties may obtain copies of the draft, and the rule-making authority is required to consider suggestions or criticisms received upon it. The Act has been of great usefulness, and frequently the Rule Committee of the Supreme Court has, after the first publication of draft rules, withdrawn a draft for alteration in accordance with suggestions received.

Another change effected with Lord Herschell's aid, after five years of agitation by the Law Society, was the addition of three active practitioners as members of the Rule Committee, by the Judicature Act, 1894.⁴¹ That Act added to the Committee the President of the Law Society for the time being (he is an annually elected officer) and two barristers to be chosen by the Lord

⁴¹ 57 & 58 Vict., c. 16, s. 4.

Chancellor. The argument in favor of the change was well put several years earlier in a legal journal:

"The learned judges who constitute the Rule Committee have often to legislate on matters of which they have no practical knowledge, and are, therefore, liable, not merely to err in alterations made by themselves, but also to have schemes foisted upon them by persons outside their body, as to the practical working of which the Rule Committee have no means of judging."

The practitioners in the Committee were further strengthened in 1909 by the substitution for the President of the Law Society of two solicitors, one from London and one from the country,⁴² as it was found that the President's annual term was too short to permit of his becoming familiar with the work. This was also in response to representations from the Law Society, Mr. A. S. Mather of Liverpool having first suggested the change in a paper read at the annual meeting in 1903.⁴³

⁴² 9 Edw. VII, c. 11.

⁴³ Printed in 47 Solicitors' Journal, 837 (October 17, 1903).

CHAPTER X.

THE RULES OF 1902.

From 1897 to the present may properly be called the third period in the life of the code of 1883. Over one hundred and seventy new Rules or amendments have been passed in this interval, but they deal principally with matters of detail. In one respect, however, they have made an alteration in the actual framework of procedure, and that is in further developing the summons for directions. After the Commercial List had been in operation a few months under the skillful guidance of Mr. Justice Mathew, the Rule Committee were satisfied that his arguments for the possibility of eliminating, or at least regulating, the delivery of pleadings had much to be said in their favor, and they considered whether or not it would be feasible to extend some of the methods of the Commercial List to other litigations in the High Court. At the end of April, 1896, Lord Halsbury summoned another Council of all the judges, for the purpose, chiefly, of considering some rearrangement of the circuits, and at that Council a committee was appointed to ascertain "whether the procedure now adopted in commercial cases might be extended or assimilated to other cases." The committee reported several months later in favor of requiring all suitors to apply to a master for leave to deliver pleadings, in something like the way they had to apply to the judge in the Commercial List, and in favor of granting leave to plead only where pleadings would be necessary.

The following spring, the Rule Committee issued a new Rule 1 of Order XXX,¹ making the summons for direc-

¹ Printed in 41 Solicitors' Journal, 507 (May 22, 1897).

tions compulsory in practically all actions in the High Court. In framing the Rule, however, the Committee failed to take into account the influence it would have on all the older provisions in the Rules regulating the delivery of pleadings. Under the new Rule a master alone must decide whether there should be any pleadings at all in an action, and if any, what pleadings; previously, when the summons for directions was optional, it was taken out in only a small proportion of cases, the suitors in all the rest delivering pleadings mutually as of course, guided by the Rules in the pleading Orders. The new Rule, therefore, caused a great deal of confusion, as the pleading Orders were left unchanged. As one commentator said: "It is an overriding provision inserted into the midst of an existing code of procedure rules, many of which it influences, some of which it practically nullifies."² In practical operation, the masters decided to disregard the conflicting passages of the older Rules, and guided themselves exclusively by the terms of the new one. This was the situation for several years, the masters in the meantime collecting notes of all the conflicts in the Rules occasioned by the breadth of the new compulsory summons.

At length, in July, 1902, the Rule Committee put an end to this anomaly by issuing a new set of Rules which swept out from all the pleading Orders the inconsistencies introduced by the change in Order XXX. At the same time they increased the usefulness of the summons for directions by extending it to include applications made *after* judgment in an action, in the course of execution or attack upon the judgment.³ The 1902 Rules, unlike the provisions of 1897, were carefully drawn, and the same critic said "without hesitation, that the

² 41 Solicitors' Journal, 857 (October 30, 1897).

³ They are printed together in 46 Solicitors' Journal, 646 (July 19, 1902).

changes in procedure made during the year are distinct improvements, clearly thought out, and as clearly embodied in the new Rules."⁴

As the matter now stands, a summons for directions must be taken out at the beginning of practically every suit,⁵ so that a master acquires *seisin* of the action and must be applied to for instructions as to the appropriate steps to be taken by the parties. Unfortunately the summons as administered is not fulfilling the purposes for which it was intended. The intention was that some idea of the nature of the case should be imparted to the master upon the first hearing, so that his order could be molded to fit the requirements of each particular case. The fact is, however, that the solicitors' clerks who appear before the master when the summons is first heard usually know little or nothing about the case, and the order made is almost always in common form: pleadings by each side in so many days, mutual discovery, trial in London with or without a jury, and "leave to apply." Any really individual treatment of the case is postponed to future applications, when its merits are beginning to develop a little more clearly, and the parties come back to the master under his "leave to apply."⁶ One result is that the masters exercise complete control over every step that can be taken. Their leave must be obtained and their decision followed in everything short of the actual trial of issues by the judge in court. To assist practi-

⁴ 47 Solicitors' Journal, 44 (November 15, 1902).

⁵ The exceptions are admiralty actions, actions begun by originating summons, and actions begun by a writ specially indorsed under Order III, Rule 6. In the last case, however, if the application for summary judgment is refused, it is treated as an application for further directions.

⁶ Testimony to this effect was given by Master T. Willes Chitty and by Lord Justice Phillimore before the recent Royal Commission on Delay in the King's Bench Division. Parl. Pap. Cd. 6762, 1913, questions 282 and 1141.

tioners, the King's Bench masters have, like the taxing masters, issued a set of practice regulations, to which they add from time to time, covering many details that are left to their discretion by the R. S. C. These "Practice Masters' Rules," unlike the Practice Notes of the taxing masters, have no statutory authority, as there is no Rule expressly authorizing their formulation.⁷

Another set of Rules issued in 1902, which won the approval and satisfaction of the profession, remodeled the system of taxing costs.⁸ They were the result of an investigation conducted in 1901 by a departmental committee whose report has not been made public. They created at the Central Office a new department which took over the business of taxations from the scattered taxing officers in the several Divisions and branches of the court, so that now all taxations are done, irrespective of the nature of the action, by twelve masters among whom the bills are distributed for scrutiny according to a rota. It was made possible for these masters to make uniform the exercise of their discretion by the following addition to their powers:

"The taxing masters shall have power to revise and regulate the practice in regard to taxation of costs, and to the allowance of fees, so as to assimilate the allowances for costs and to secure uniformity upon all taxations as far as may be practicable and expedient."⁹

Under this power the taxing masters issued a set of Practice Notes in Hilary Term, 1902, popularly known as the "Blue Book," which conveyed to the profession welcome instructions in detail as to how they desired matters to be prepared for taxation and also announced

⁷ They are printed in the 1914 White Book, pp. 2341-63. They are divided into twenty-seven sections, each containing a number of rules.

⁸ R. S. C., January, 1902. Signed December 13, 1901. They are printed in 46 Solicitors' Journal, 134 (December 21, 1901).

⁹ Order LXV, Rule 27 (37).

what course would be taken by them in allowing or disallowing many items of costs in respect of which the precedents in the various Divisions were not uniform.¹⁰

To these administrative Rules were added a few new directions affecting the taxations themselves. These are contained in the regulations which make up Rule 27 of Order LXV. A most interesting one of 1902 reads as follows:

"On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same *no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake* or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."¹¹

This is now the kernel of the whole Rule. It is the touchstone which the taxing master can apply to every item in a bill of costs.

After 1902 there is nothing of importance in the history of procedure for over a decade. In 1908 a set of Rules was passed to send all interlocutory applications and appeals in King's Bench actions to the judge who would eventually try the action, instead of to a special Judge in Chambers, as before, who heard appeals from all the masters. This was inspired by the success of that system in the Chancery Division and the Commercial List, but it failed to take into account the uncertainty of arrangements in the King's Bench Division, where judges are constantly being withdrawn for circuit and for criminal sittings, and the experiment was

¹⁰ These Notes appear in the 1914 Red Book (the Yearly Practice), p. 2147. Under Order LXV, Rule 18, the distribution of work among the taxing masters is left to be arranged by themselves, and they have issued regulations, which are reproduced in the note to the Rule in the Red Book.

¹¹ Order LXV, Rule 27 (29).

discontinued in 1909. Around 1909 there was a great deal of agitation for the appointment of additional judges to the King's Bench Division. A Royal Commission presided over by Lord Gorell heard evidence on the subject in 1907, and in 1909 a joint select committee of both Houses of Parliament went over the ground again, with the result that in 1910 an Act was passed increasing the membership of the King's Bench Division from sixteen to eighteen judges as a temporary expedient until the arrears in the trial lists were cleared off.¹² The question of arrears in the King's Bench Division has been a popular one for Parliamentary oratory in recent years, although it has required some effort of the imagination to find any serious arrears.

Early in 1913, after the matter had been once more considered by a committee of the Cabinet, it was decided, in order to quiet further discussion, to appoint a Royal Commission to investigate the alleged delays.¹³ The Commission heard evidence from January to June; the minutes of this evidence are of especial value, because it went further than merely to scrutinize the organization of the court and the distribution of work among the judges; it covered as well the procedure, with the idea that speed in procedure means absence of arrears, and the testimony published¹⁴ contains many interesting descriptions, by persons in actual authority, of the duties performed by the various officers of the court and the

¹² 10 Edw. VII & 1 Geo. V, c. 12.

¹³ The Commission was presided over by Viscount St. Aldwyn (the former Sir Michael Hicks-Beach), and included representatives of the Civil Service, the Bench, the Bar, and the Law. Among the witnesses examined were nearly all the occupants of high judicial office, many judges, quasi-judicial officers, barristers, solicitors, and others.

¹⁴ The Report and Evidence were published as Blue Books: Parl. Pap. Cd. 6761, 6762, 7177, and 7178 (1913).

course of proceedings in each of their departments.¹⁵ Several prominent witnesses confined themselves exclusively to procedural matters, and on their testimony the Commission based recommendations which will ultimately bear fruit.¹⁶ The Report was presented November 28, 1913, and there is now a committee of judges considering the recommendations it contains.

¹⁵ To mention a few: duties of King's Bench judges described by Lord Justice Phillimore in Questions 1028-1039 and 1176; Chancery judges, by Lord Cozens-Hardy, M. R., in Questions 473 and 492, and by Lord Justice Swinfen-Eady in Questions 1249-59; King's Bench masters, by Master Chitty, in Questions 274-83; Chancery masters, by Master Fox, in Questions 4819-20; registrars, by Mr. Registrar Farmer in Questions 5037-8.

¹⁶ The suggestions on procedure are tabulated in Appendix 8 to the Report. Cd. 7178, pp. 231-7.

CHAPTER XI.

RULES TO COUNTERACT DECISIONS.

The larger part of the five hundred amendments to the R. S. C. 1883 cannot be grouped together as the product of concerted movements or general agitations for reform; unlike the changes reviewed in the foregoing sections, each of them stands more or less alone, with a story of its own. They can, however, for convenience, be classified according to their character rather than their origins, and such a method brings out the fact that they fall, roughly, into five or six general categories whose diversity is further evidence of the advantages of the rule-making system over the regulation of procedure directly by statute.

To a student of the rule-making authority as a new development in the machinery of legislation the most striking of these categories, though not the most numerous or the most weighty in its content, is that which contains amendments made with the purpose of counteracting various judicial decisions in the Supreme Court and the House of Lords. Frequently a branch of the Court of Appeal, or a Judge in Chambers, or some other tribunal, will, in the consideration of a specific set of facts, interpret an existing Rule or practice in such a way as to impair the usefulness or to restrict the scope for which it was apparently intended; sometimes such a decision cannot be avoided when the ordinary canons of interpretation are applied to a loosely worded passage in the Rules. When that occurs and the resulting inconvenience is brought to the attention of the Rule Committee, the usual course is the promulgation of an alteration in the

wording of the Rule, or an addition to it, which will make it clear, so that without expressly overruling decisions, the Committee is able effectually to overcome their binding force. This is a use of the rule-making power which was probably not contemplated by its creators, but as the power has been so exercised no less than twenty-five times since 1883 without question, the method seems to be accepted as clearly *intra vires*.

Among the amendments in this class the one that borders nearest on the domain of substantive law is the addition made in 1896 to the Rule permitting joinder of parties. Order XVI, Rule 1, as formulated in 1883, read as follows:

"All persons may be joined in one action as plaintiffs in whom any right to relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief," *etc.*

In the nineties a line of decisions interpreted this Rule as limiting the joinder to parties who claimed *the same relief*, thereby materially restricting the classes of claims that might be joined under the Rule. It was considered necessary to remove the obstacle, so in 1896 the Rule was altered to read:

"All persons may be joined in one action as plaintiffs in whom any right to relief *in respect of or arising out of the same transaction or series of transactions* is alleged to exist, whether jointly, severally, or in the alternative, *where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of an action, the Court or a Judge may order separate trials, or make such other order as may be expedient*, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief," *etc.*

Thus the doctrine of 1873, that the sole limit for the right to join claims and parties should be the convenience of trial, was emphasized and reaffirmed, and the effect of the decisions that sought to hamper it swept away.

Since 1896 joinder has been permitted under the new Rule in many cases in which, under the prior interpretation, it would have been refused.

It is interesting to examine the decisions which brought about this result, as the instance is typical. The first was *Smurthwaite v. Hannay*, in the House of Lords,¹ in which it was decided that the old Order XVI, Rule 1, did not permit of a joinder in one action by sixteen persons (nine being shippers and seven consignees, of cotton under various bills of lading) against the ship-owners, for short delivery. Lord Chancellor Herschell in his judgment, after reading the words of the Rule, said:

"This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief,"

and Lord Russell of Killowen, C.J., also felt that the Rule was too broadly worded, as under it

"it would be possible to join any number of plaintiffs with distinct causes of action against any number of defendants charged on distinct grounds of liability."

The limitation declared in that case was followed without hesitation by the Privy Council in *Peninsular and Oriental Steam Navigation Company v. Tsune Kijima*,² an action under Lord Campbell's Act, in which sixty-two different groups of persons joined, claiming damages for injury done to them by the drowning of sixty-two seamen whom they represented, and alleging that a collision between two ships was due to the negligence of the defendant's servants. The following year, in a Divisional Court sitting to hear County Court appeals, Lord Russell was obliged to follow his House of Lords judgment in a case of most distressing character. Fifty miners were drowned in the sudden flooding of the seam in which they were

¹ [1894] Appeal Cases, 494.

² [1895] Appeal Cases, 661.

working, and their representatives joined in an action under Lord Campbell's Act, brought in the local County Court. The County Court Rule on joinder of plaintiffs, Order III, Rule 1, was identical with Order XVI, Rule 1, in the High Court Rules, and the Divisional Court held, *Carter v. Rigby and Company*,³ that the joinder could not be allowed under the Rule as interpreted by the House of Lords. The Lord Chief Justice said:

"I am sorry to feel obliged to come to this conclusion, for although I cannot doubt that *Smurthwaite v. Hannay* was rightly decided, I think it in every way desirable that Order III, Rule 1, should be so framed as to permit such a joinder as that here in question, subject to the control of the Court where inconvenience or injustice might arise from following that course, and I hope that the Rule Committee may see fit to amend Order III, Rule 1 "

The case was taken up to the Court of Appeal, but Lord Esher dismissed it with the comment that:

"The House of Lords has put a construction upon it, and we cannot go beyond or behind that decision."

At the beginning of the next sittings of the Court, October 26, 1896, the Supreme Court Rule Committee met once more, and acting upon the suggestion of Lord Russell issued the amendment to Order XVI, Rule 1, of the Supreme Court Rules which has been quoted and whose effect has been described; a few weeks later, November 19, the identical amendment to Order III, Rule 1, of the County Court Rules was made by the County Court Rule Committee and approved by the Lord Chancellor. In this manner a quasi-legislative body, composed of eight judges, two barristers and a solicitor, altered the law of the land as it had been declared by the highest tribunal in the Empire.⁴

³ [1896] 2 Q. B. 113.

⁴ A few decisions under the Rule as altered are: *Drincqbier v. Wood*, [1899] 1 Ch. 393, where four plaintiffs, holders of several debentures, joined in an action against a company, alleging false

Another amendment in this class dealing with parties is that made in 1911 definitely extending third party procedure in a direction where there had been a conflict among courts. The third party procedure was introduced by Section Twenty-four of the Judicature Act, 1873, and its scope was at first not clearly understood. In *Fowler v. Knoop*, in the Exchequer Division in 1877,⁵ a consignee under a bill of lading was sued for delay in unloading; he brought in as third party the person to whom he had transferred the bill of lading while the goods were still afloat; that person desired to bring in as fourth party another one to whom he had, in turn, transferred the bill of lading while the goods were still afloat. The court, at first doubtful, permitted the step after argument by Mr. (now the Right Honorable Sir) Arthur Wilson, the draftsman of most of the 1875 Rules. But in the same year, in *Walker v. Balfour*,⁶ in the Common Pleas Division, a similar permission was refused, Mr. Justice Denman declaring it was not open to defendants to postpone the plaintiff indefinitely by bringing in other persons *toties quoties*. Many years later Mr. Justice Eve in the Chancery Division decided in *Klawanski v. Premier Company*⁷ that the third party could, if he

statements in the prospectus and claiming damages; *Oxford & Cambridge v. Gill*, [1899] 1 Ch.55, which was an action by the two Universities to restrain the use of the words "Oxford and Cambridge" in the title of the defendant's publications; *Walters v. Green*, [1899] 2 Ch. 696, in which several employers moved for an injunction to restrain certain officials of trade unions from watching and besetting certain places for the purpose of persuading workmen not to work for the plaintiffs; and *Ellis v. Duke of Bedford*, [1901] Appeal Cases 1, where six several growers of fruit, on behalf of themselves and all other such growers, sued the owner of Covent Garden Market for alleged invasion of their rights in it.

⁵ 36 Law Times Reports, 219 (1877).

⁶ 25 Weekly Reporter, 511 (1877).

⁷ Weekly Notes (1911) 94. This was an action by A against a company for transferring shares on their books from A's name to B's

chose, step aside and bring in a fourth party to defend. After that case a Rule was added to Order XVI to authorize the procedure and to set at rest any doubt as to its correctness.⁸ Under the new Rule "third party notices" have been issued in an action by successive parties even up to the eighth and ninth party. The Rule is not of frequent application, but it is exceedingly useful in cases where there have been successive transfers of mercantile documents, or of leases containing repair clauses, *etc.*

It will be recalled that one of the improvements introduced by the 1875 Judicature Rules was to allow a partnership to be sued in the firm name and require, thereupon, that the partners must enter their appearances individually; service might be effected either upon any partner, or upon the person in control of the firm's place of business, and if a person served "as a partner" failed to appear, he was penalized by having his personal property made liable to execution under a judgment against the firm. In most actions against partnerships it was the practice to effect service upon the

without A's consent. The company, having acted on orders of transfer purporting to be signed by A, but presented by B, brought in B as a third party from whom indemnity could be claimed in the event of A's succeeding. B, in turn, issued a "third party notice" to C, a brother of the plaintiff, on whose representations he had presented the orders of transfer to the company as valid. At the trial C actually appeared and defended the action, taking the chief part in bringing the facts of the case to light, and the plaintiff's action was dismissed. The case was reported on the raising of a question as to whether the court had jurisdiction to order the plaintiff to pay for fourth party's costs.

⁸ Order XVI, Rule 54A: "Where any person served with a third party notice by a defendant or by a third party under these Rules claims to be entitled to contribution or indemnity over against any person not a party to the action he may by leave of the court or a judge issue a third party notice to that effect; and the preceding Rules as to third party procedure shall apply *mutatis mutandis* to every notice so issued."

person in control of the place of business and serve him "as a partner," although frequently he was not a partner at all, but merely an employee. In an action undefended by the firm, therefore, that employee ran the risk of having his private property taken in execution, as he would be a person served "as a partner," who failed to appear. The exact combination of facts did not arise in a very large number of actions, but it was familiar enough to cause the practice masters to issue a regulation in 1887, to the effect that when those conditions were present the Central Office should accept from the employee an appearance "with a denial of partnership," which would still leave the plaintiff free to sign judgment against the firm itself for default of appearance. In 1890 this device was brought to the attention of the Court of Appeal in *Davies and Company v. André and Company*,⁹ and they ruled that there could be no such thing as a conditional appearance; the person served, they said, either is a partner or is not a partner; if he is a partner he must appear unconditionally, and if he is not a partner he must not appear at all. That decision put the employee to the risk of having to prove, when execution against his private property was applied for, that he was not a partner — a risk augmented by the mysteries of the law of partnership. A few weeks after the decision, an employee in control of his firm's place of business was served "as a partner," and wishing to deny the partnership he tendered to the Central Office an appearance reading as follows: "Enter an appearance for A, *served as a partner* in the firm of B & Co.," but the appearance was refused under the authority of *Davies v. André* and that refusal was sustained by a Divisional Court, in *Allden v. Prentis and Company*,¹⁰ on the ground that the

⁹ 24 Q. B. D. 598 (1890).

¹⁰ 34 Solicitors' Journal, 541 (1890).

appearance must be unconditional to be accepted. The tables were now turned, as the plaintiff soon discovered, for the situation now was that there was an unconditional appearance entered which would bar him from obtaining his judgment for default of appearance and the firm was given, without the asking, more time before having to submit to judgment.

The anomalies in the situation were pointed out in a series of three articles in the Solicitors' Journal¹¹ by Mr. Francis A. Stringer of the Central Office. Not long afterward, Parliament enacted the codifying Partnership Act, 1890, and the Rule Committee decided to revise completely the Rules on suits by and against firms, scattered through the White Book, with a view to removing inconsistencies. It is supposed that Lord Justice Lindley (the author of Lindley on Partnership) was the prime mover in this decision. On June 19, 1891, the new Rules were signed; they combine in a new Order, Order XLVIII A, eleven Rules affecting partnerships as parties. They remove the difficulties raised by *Davies v. André* and *Allden v. Prentis* by expressly permitting any person served "as a partner" to enter "an appearance under protest, denying that he is a partner," without prejudicing the plaintiff's right to sign judgment against the firm itself for failure to appear.¹²

Not so comprehensive a change as to parties, but one affecting a Rule applied with equal frequency, was made in 1893 to Order XVI, Rule 8. That Rule, reproduced

¹¹ Vol. 34, pp. 520, 541 and 562 (June, 1890).

¹² Order XLVIII A, Rule 7. What the plaintiff must do is to serve the employee both "as a partner" and "as the person in control," giving written notice to that effect under the new Order XLVIII A, Rule 4. Therefore, although the conditional appearance may block him from treating the employee as a partner, the plaintiff may still take his judgment against the firm because his writ has been served upon the person in control of the place of business.

from section 42 (9) of the Chancery Procedure Act, 1852, allows all trustees to sue and be sued in actions touching the property they represent, without joining as parties their *cestuis que trust* (subject to the power of the court to order beneficiaries made parties where advisable). In *Francis v. Harrison*, 1889,¹³ it was laid down as a general rule, despite this, that a trustee mortgagee does not sufficiently represent his *cestuis que trust* as defendant in a *foreclosure* action. In that case the trustee happened to be a bankrupt, but the judgment of North, J., was broad enough in its terms to apply to all foreclosure actions, and was so applied several times in chambers after 1889. The Rule Committee evidently thought this an unnecessary limitation, for in 1893 the following sentence was added to the end of the former Rule:

"This Rule shall apply to trustees, executors and administrators sued in proceedings to enforce a security by foreclosure or otherwise."

Turning from the subject of parties to that of the indorsement on the writ two amendments are found in the category under discussion. The first overturns a decision of the Court of Appeal with remarkable brevity. The procedure for summary judgment on liquidated money claims, developed out of the Bills of Exchange Act, 1855, had been extended in 1883, by adding the following line to Order III, Rule 6:

"or in actions for the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant";

the object being to provide a summary method for the recovery of tenements in cases which are practically never defended. It was early held in chambers, in 1884, by Mr. Justice Mathew, who was a member of the 1881

¹³ 43 Ch. Div. 183 (1889).

Procedure Committee which recommended the extension, that this part of the Rule was never intended to apply to cases where the lease had been determined by a forfeiture for non-payment of rent, but only to those in which the lease had run out to its natural termination; and in two cases of forfeiture he refused leave to indorse the claim specially under Order III, Rule 6.¹⁴ The Court of Appeal gave binding force to this view ten years later in *Arden v. Boyce*,¹⁵ where the exact point was carried up from the Judge in Chambers through the Divisional Court, Lord Justice Davey explaining that:

"The principle appears to be that the court will not give a summary judgment in cases where an action for recovery of land is based on a forfeiture."

But in January, 1902, when the Rule Committee were clearing away the weeds that had sprung up around the 1897 summons for directions, they added a very short phrase to Order III, Rule 6, which made its land clause read as follows:

"or in actions for the recovery of land, with or without a claim for rents or *mesne* profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, *or has become liable to forfeiture for non-payment of rent,*" etc.

and those few words removed *Arden v. Boyce* from the precedent books without further ado.

A few months later, July, 1902, the Rule Committee made an amendment affecting the indorsement of *unliquidated* claims. Under the Common Law Procedure Acts there was no such thing as a judgment for want of an appearance; the practice had been for the Court to order an appearance to be entered for the absent defendant, then to order the plaintiff to file his statement of

¹⁴ *Burns v. Walford*, Weekly Notes (1884), 31 and *Mansergh v. Rimell*, Weekly Notes (1884), 34.

¹⁵ [1894] 1 Q. B. 796.

claim, and then to give judgment against the defendant for failing to plead. The Judicature Rules of 1875, and again in 1883, contained a section improving the facilities for judgments by default. Order XIII, Rule 5, provided that where the writ was indorsed with a claim "for detention of goods and pecuniary damages, or either of them," and the defendant failed to appear, the plaintiff might, without having to file a statement of claim, sign interlocutory judgment, and proceed to assess his damages by writ of inquiry or in any other way directed by the court.

This Rule was the subject of argument in a case of *Eyre v. Eyre*, before Mr. Justice Bucknill in 1901.¹⁶ There the claim was for pecuniary damages for slander, and no appearance being entered the plaintiff signed interlocutory judgment and issued his writ of inquiry under Order XIII, Rule 5. The defendant then sought to have the interlocutory judgment set aside on the ground that Order XIII, Rule 5, applied only when the pecuniary damages were for the detention of goods, not for *other* forms of injury. The judge was inclined to agree that the defendant's contention was sound, but being confronted with the fact that the practice not only of the English but of the Irish and Colonial courts for twenty-five years, under Order XIII, Rule 5, had been to apply it to *all* cases where pecuniary damages were claimed, he avoided the difficulty by setting aside the judgment under the general power of the court to set aside default judgments on proper terms.¹⁷ At the same time he said that Order XIII, Rule 5, if it was intended to apply to the case in hand, was "about as badly worded as it possibly could be," and he promised to "communicate with the Rule Committee, pointing

¹⁶ Reported in 45 Solicitors' Journal, 653 (July 13, 1901).

¹⁷ Order XXVII, Rule 15.

out to them the difficulty which had arisen, in the hope that they would deal with similar cases." His representations to the Committee (of which he was not himself a member) resulted in an amendment to Order XIII, Rule 5, among the Rules of July, 1902, which made it apply thenceforth to all cases

"where the writ is indorsed with a claim for *pecuniary damages only* or for detention of goods with or without a claim for *pecuniary damages*,"

and no doubts have since been thrown upon the meaning of the Rule. The Solicitors' Journal said of the case at the time: "It will stand almost alone among reported cases, because Mr. Justice Bucknill withheld his decision on the real point at issue with the avowed purpose of allowing time for the matter to be brought to the attention of the Rule Committee in preference to giving a judgment which would have the effect of upsetting the established practice on an important point."¹⁸

Two amendments of some importance as to interlocutory matters fall within this category. The first relates to the obligation of infant parties to make discovery of documents and to answer interrogatories under the Rules in Order XXXI. Under the old Chancery Rules, in effect before the Judicature Acts, they had never been obliged to give discovery or to answer interrogatories, and for that historical reason it was held repeatedly in the High Court that neither the guardian *ad litem*¹⁹ nor the next friend²⁰ of an infant could be compelled to answer, although it was also conceived that they were not the "parties to the action" to whom Order XXXI applied. Two cases explicitly exempted the infant

¹⁸ 45 Solicitors' Journal, 648 (July 13, 1901).

¹⁹ *Ingram v. Little*, 11 Q. B. D. 251 (1883). Answers to interrogatories.

²⁰ *In re Corsellis*, 52 L. J. Ch. 399 (1883), and *Dyke v. Stephens*, 30 Ch. D. 189 (1885), both as to discovery of documents.

himself from filing an affidavit of documents²¹ and from answering interrogatories,²² solely because he could not have been compelled to do so before the Judicature Acts. All these memories of the dead hand of the old chancery practice were dissolved away by a short new Rule added to the end of Order XXXI in 1893, which states:

"This Order shall apply to infant plaintiffs and defendants, and to their next friends and guardians *ad litem*."

The other amendment, an early one, touches the liability of a plaintiff to give security for costs. The Judicature Rules do not prescribe the cases in which he may be ordered to do so, but the well-known rule that a plaintiff resident out of the jurisdiction may be ordered to give such security is perpetuated by the section of the Judicature Act saving existing procedure not repealed. In 1879, in a case of *Redondo v. Chaytor*,²³ the Queen's Bench was called upon to decide whether a plaintiff should be ordered to give security for costs, who, though ordinarily resident in Spain, was then temporarily residing in England, and Lord Justice Thesiger, after an exhaustive review of the authorities both in common law and in equity, delivered a judgment to the effect that there was a well established rule of practice that a plaintiff who is residing even temporarily within the jurisdiction of the court cannot be compelled to give security for costs. Several years later in *Ebrard v. Gassier*,²⁴ the Chancery Division with great reluctance admitted it was bound by this decision in a case where the plaintiffs were a firm resident in Mexico, one of whose members had gone to England solely for the purpose of

²¹ *Curtis v. Mundy*, [1892] 2 Q. B. 178.

²² *Mayor v. Collins*, 24 Q. B. D. 361 (1890).

²³ 4 Q. B. D. 453 (1879).

²⁴ 28 Ch. Div. 232 (1884).

prosecuting the action. The Rule Committee corrected this state of things in the following year, 1885, by a new Rule which recites that:

"A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction."²⁵

Sometimes a decision upon an old rule of practice is the means of calling attention to possible changes in it, as the following shows. Under the old chancery practice, of which an illustration is *Hinings v. Hinings*,²⁶ it had been the custom when a legatee of a sum less than £20 died, and no administration issued upon his estate, for the court to pay out the sum to his next of kin without requiring an administration to be raised. In 1901 it was sought to persuade a judge in the Chancery Division, by the analogy of the old practice, to pay out a small sum of money which was in a fund in court to the next of kin of the person entitled, without requiring an administration to be raised,²⁷ but the application was refused, the court conceiving it could not make such an extension of its powers. The watchful Rule Committee, in the following year (when some of the best amendments were written), then passed a Rule which in effect overruled the decision by extending the practice to cover the order sought.²⁸ Now any sum in court less than £100 will be paid out to the next of kin of an intestate distributee, without requiring letters of administration to be taken out, provided the total assets of the deceased, including his share of the fund in court, do not exceed £100. This means a most acceptable saving of expense in cases where the pennies count.

²⁵ Order LXV, Rule 6A.

²⁶ 2 Hemming & Miller, 32 (1864).

²⁷ *Frogley v. Phillips*, 50 Weekly Reporter, 184 (1901).

²⁸ Order XXII, Rule 18A.

*Sodeau v. Shorey*²⁹ was a case that might have caused sheriffs great concern, but for the prompt action of the Rule Committee. In levying execution under a *fiery facias* a sheriff seized some goods belonging not to the debtor but to the debtor's brother, who at once claimed them. The sheriff notified the execution creditor, who wired back: "Admit claim; please withdraw." The sheriff, being threatened by the real owner with an action for trespass, then took out an interpleader summons under which he applied for an order to stop the action, but the order was refused; on appeal the Court of Appeal decided the sheriff could not so protect himself, as an interpleader proceeding would merely bring in, to contest the owner's claim, the creditor who had already admitted it. This would have thrown upon sheriffs generally an extra risk in the prosecution of their duties, so the Rule Committee was prevailed upon to act, and less than three weeks after Lord Esher's judgment was delivered a draft Rule was signed to meet the situation and free the sheriffs from the risk the decision imposed.³⁰ It provides that:

"When the execution creditor has given notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from possession of the goods claimed, and may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods, and the Judge or Master may make any such order as may be just and reasonable in respect of the same. . . ."

The protection thus afforded seems to have caused satisfaction, as no cases have been reported under the new Rule.

Personal service of writs out of the jurisdiction is one of the facilities regulated by the R. S. C. which arouses great curiosity in an American; the privilege is limited

²⁹ 74 Law Times Reports, 240 (March 18, 1896).

³⁰ Order LVII, Rule 16A.

to certain classes of cases enumerated in Order XI, Rule 1. One of these, as worded in 1883, was

"whenever the whole subject-matter of the action is land situate within the jurisdiction."³¹

This was always considered to refer only to actions in which the *title* to the land came into question, but in 1912 that restriction was removed in a curious way. Under a settlement, certain estates in Yorkshire were limited to the sons of X in tail male, first to A and his sons, then to B and his sons, then to C and his sons, etc., successively. A son was born to A in California, and A registered the infant there as a legitimate child. The other sons of X thereupon brought an action in the High Court to perpetuate testimony tending to prove the child was illegitimate, so that when A might die the evidence should not have been lost. As the infant was in California, they sought to obtain an order for service upon him out of the jurisdiction, on the theory that the *land* in question was situated within, but the Court of Appeal decided the Rule did not apply; this was an action relating merely to *evidence*, they said, not to the title to the land.³² The resulting inconvenience must have been plainly apparent not only to the court, but to the Rule Committee as well (Cozens-Hardy, M.R., being at the time a member of both), for just nineteen days later, April 3, 1912, the Committee published an amendment adding to the Rule the following words:

"or the perpetuation of testimony relating to the title to land within the jurisdiction."

While the application of this part of the Rule is rare, the amendment is of interest as holding, together with the interpleader amendment just noted, the record for swiftness of arrival.

³¹ Order XI, Rule 1(a).

³² *Slingsby v. Slingsby*, [1912] 2 Ch. 21.

Another amendment in the same Order is distinguished for the fact that it overrules more decisions than any other in this category. It is the one authorizing service of *interlocutory* summonses, orders and notices out of the jurisdiction, in all actions in which the writ itself might be so served.³³ This was made in 1909 and upset the whole previous course of the practice under the Order, as established by numerous reported decisions from 1883 down.

A number of other amendments in this category might be described, but they require more intimate acquaintance with their context than it is possible to give here.³⁴ They all have this in common, that they were issued by the Rule Committee to destroy the effect of judicial decisions without expressly referring to them. The power to do this is not altogether a power to overrule, as that would be inherent only in a higher court; the word

³³ Order XI, Rule 8A.

³⁴ Among them are five amendments on costs and six of a miscellaneous nature:

Order LXV, Rule 26A (1903), which counteracts *Re Pollard*, 20 Q. B. D. 656 (1888), and *Re Collyer-Bristow & Co.*, [1901] 2 K. B. 839; Order LXV, Rule 27 (17a) (1902), *Wicksteed v. Biggs*, 54 L. J. Ch. 967 (1885), and *Brown v. Sewell*, 16 Ch. Div. 517 (1880); Order LXV, Rule 27 (17b) (1902), *Silkstone Coal Co. v. Edey*, [1901] 2 Ch. 652; Order LXV, Rule 27 (29A) (1909), *Sadd v. Griffin*, [1908] 2 K. B. 510; Order LXV, Rule 27 (48) (1886), *Re Harrison*, 33 Ch. Div. 52 (1886).

Order XVIII, Rule 2 (1888), on joinder of claims, which counteracts *Sutcliffe v. Wood*, 53 L. J. Ch. 970 (1884); Order XXII, Rule 2 (1913), on payment into court, *Penny v. Wimbledon*, [1898] 2 Q. B. 212, and *Beadon v. Capital Syndicate*, 28 Times Law Reports, 394, 427 (1912); Order XXXV, Rule 5(f) (1894), on interpleader orders, *Hood v. Yates*, [1894] 1 Q. B. 240; Order XXXVI, Rule 1A (1884), on abolition of venue, *Philips v. Beale*, 26 Ch. Div. 621 (1884); Order LII, Rule 24 (1899), on solicitors, *Re Davidson*, [1899] 2 Q. B. 103; Order LVIII, Rule 15A (1885), on chancery chambers, *Cummins v. Heron*, 4 Ch. Div. 787 (1876), and *White v. Witt*, 5 Ch. Div. 189 (1877).

"counteract" is a happier description, and the foregoing paragraphs illustrate how, in exercising their delegated legislative powers, the Rule Committee can counteract the decisions of any court in England, not being circumscribed even by the judgments of the House of Lords.

CHAPTER XII.

RULES CREATING NEW PROCEDURE.

Of the other five categories the one of most consequence is that containing the amendments which create new departures in procedure — what might be called the solid substance of procedure, as distinguished from mere rules of practical direction. Many such have been noticed above, in the historical review of the period from 1883 to the present, as they are the strands out of which the history of procedure is woven. But there are many which found their way into the fabric independently of each other and were not contributed as part of any general design, and some of these are worthy of attention.

Among them the most characteristic is that which deprived the plaintiff of the right to select the place of trial of his action. Local *venue* had been abolished in 1875, and the plaintiff was then given the right to name, in his statement of claim, the county or place in which he proposed the action should be tried, which would then bind the defendant unless the court could be persuaded, for good cause, to alter it. In 1897, when the summons for directions was reconstructed, it was provided that the place of trial should be one of the matters dealt with on the hearing of that summons, but the defendant was still obliged to accept the place nominated by the plaintiff unless he could convince the master that the balance of convenience was heavy enough on his side to warrant a change. When the pleading Orders were smoothed out in 1902, the place of trial Rule was altered to read:

"There shall be no local *venue* for the trial of any action, . . . but in every action in every Division the place of trial shall be fixed by the court or a judge."¹

¹ Order XXXVI, Rule 1.

so that the selection of the place of trial was taken completely out of the plaintiff's hands. It is now a matter solely for the master to decide on the summons for directions; in doing so he is guided, it is true, by the same considerations he had to weigh previously in hearing the defendant's application to alter the place of trial, but he approaches the matter now without being influenced by the thought that, all other things being equal, it is for the plaintiff to choose the place. The master is free to fix the place wherever it will be most convenient for the majority of the parties and their witnesses to attend. This is one of the further developments of the tendency under the Judicature Acts to take the control of the litigation out of the hands of the plaintiff and repose it entirely in the court.

Procedure on motions for new trials has been altered considerably since 1875. Under the first Judicature Rules² all such motions went to a Divisional Court—the modern form of the old sittings in banc.³ In 1883

² Order XXXIX, Rule 1.

³ In the King's Bench and the Probate Divisions, Divisional Courts as constituted by § 17 of the Appellate Jurisdiction Act, 1876, consist of two or three judges of the Division. Any two judges may sit together as a Divisional Court, and there may be more than one Divisional Court sitting in the same Division at the same time. In the King's Bench Division the Lord Chief Justice allots the work of the Divisional Courts among the *puisne* judges, as the need arises; often a Divisional Court will be constituted to sit for a half hour in the morning before taking the regular business. In the Chancery Division it is not customary to have Divisional Courts. In the Probate Division there are only two judges, and they sit together whenever a little work accumulates for a Probate Divisional Court. There has always been a prejudice against the system of Divisional Courts, and their jurisdiction has been steadily reduced in favor of sending applications direct to the Court of Appeal. At present the bulk of their work consists in hearing appeals from inferior courts, and their powers and procedure are regulated by Order LIX of the R. S. C. 1883. See note 15, Chap. II.

a distinction was made between actions in which the trial had been before a judge alone, and those in which there had been a jury trial; in the latter the old procedure was retained, but in the former it was ruled that the motion should be made direct to the Court of Appeal and should be in form an appeal. In 1890 a fresh Judicature Act⁴ reduced the jurisdiction of Divisional Courts, the intention being to do away with them altogether by degrees, and in conformity to it a Rule was added to Order XXXIX in 1892 directing that, after jury trials as well, the motion for a new trial should be direct to the Court of Appeal and should be in form an appeal. At the same time this important clause was added, that

“upon the hearing of such motion the Court of Appeal shall have all such powers as are exercisable by it upon the hearing of an appeal.”

To appreciate the full force of this it is necessary to read Order LVIII, Rule 4, which bestows the powers so exercisable. It says:

“The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact . . . by oral examination in court, by affidavit, or by deposition. . . . The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. . . .”

In the light of this comprehensive Rule, the complete assimilation of motions for new trials to appeals explains the comparative rarity of retrials in English

⁴ 53 & 54 Vict., c. 44, s. 1.

courts. In 1913 Order XXXIX was recast and the wording of the opening Rules condensed into two short Rules.

A provision wholly original and unique, for the protection of infant and weak-minded plaintiffs, was made in the R. S. C. 1883. That was Order XXII, Rule 15, which directed that if a sum of money was recovered in the Queen's Bench Division by an infant or a "person of unsound mind not so found by inquisition" the judge might, at or after the trial, order the sum to be paid into court, and from time to time make such order as to the income or the principal as he might deem proper. This wise Rule was intended to protect helpless incompetents from the ignorance of inexperienced guardians and the wiles of sharp practitioners, especially in the large class of cases known as "running-down actions." It frequently occurred that a child would be injured by a tram or omnibus; the parents, poor, would entrust the matter to one of the solicitors who are specialists in negligence cases. The father would be named the child's next friend to prosecute the action; and if any sum of money was recovered, it would be paid by the defendant to the solicitor, to be handed over to the father as guardian. Many cases came to light in which the money so recovered was frittered away by the solicitor in extra work for which there was no need, or in which the guardian was persuaded to make some investment which turned out to be for the solicitor's benefit and not for the child's; in some instances there were even found agreements between the solicitor and an equally unscrupulous father to divide up the proceeds, regardless of the child's claims altogether. The new Rule put a stop to these abuses. The money would be paid into court, the usual order being that the income should be paid out from time to time for the child's maintenance. When the infant attained maturity, the court would

usually consider its duty had been done and pay the principal over to the child itself.

This Rule was not applied in every case in which an infant plaintiff recovered a verdict, but it was applied with great frequency and it was open to the judge to apply it of his own motion if the circumstances appeared to him suspicious. In 1906, Parliament acceded to a long-continued demand for the creation of a Public Trustee,⁵ and that office was established to administer trusts of all sorts under a government guaranty. After two or three years the remarkably able administration of the office won the approval even of its most skeptical opponents, so that in 1909 the King's Bench masters proposed to the Rule Committee that it would be a decided advantage if moneys set apart under Order XXII, Rule 15, were paid over to the Public Trustee, as he had the facilities and equipment for looking after each case individually and really standing *in loco parentis*. Accordingly the Rule was altered, and since then the Public Trustee has had the administration of the fund.⁶ The Rule was further strengthened by a much needed addition. Previously there was no power in the judge to make an

⁵ 6 Edw. VII, c. 55.

⁶ From the Public Trustee's Report for the year ending March 31, 1915 (see 59 Solicitors' Journal, 408, April 17, 1915): "A useful function of the department is the holding under Order XXII, Rule 15, of damages recovered by infants in the King's Bench Division. More than 700 such funds have been paid over to the Public Trustee, and he has still in hand 650 cases, the benefit belonging to upwards of 1,000 infants. "It should," says Mr. Stewart, "be borne in mind that the greater number of these children are handicapped by physical injuries which are often of a permanent and serious nature. It will then be realized that the exercise of the Public Trustee's discretion in each individual case as regards the application of the money in such a way as to secure as far as may be the acquisition of a skilled trade or form of employment such as to make them self-supporting before attaining their majority and receiving the balance of their funds, is a matter of exceptional importance."

order under the Rule *before* trial; only "at or after the trial" could he do so.⁷ But in a very large proportion of accident cases a compromise would be effected; the defendant would prefer to pay a lump sum to settle the dispute and prevent the action going before a jury. In those cases the court was powerless to apply the Rule. Moreover the few solicitors at whom the Rule was aimed would advise a settlement even where it was not to the plaintiff's advantage, simply to evade the court's watchfulness.

To meet that situation the Rule Committee took advantage of the 1909 opportunity to alter the opening sentences of the Rule so that they now read as follows:

"In any cause or matter in the King's Bench Division in which money or damages is or are claimed by or on behalf of an infant or a person of unsound mind not so found by inquisition, no settlement or compromise, or acceptance of money paid into court, whether before or at or after the trial, shall be valid without the sanction of the court or a judge, and no money or damages recovered or awarded in any such cause or matter, whether by settlement, compromise, payment into court or otherwise, before or at or after the trial, shall be paid to the next friend of the plaintiff or to the plaintiff's solicitor unless the court or a judge shall so direct. All money or damages so recovered or awarded shall, unless the court or a judge shall otherwise direct, be paid to the Public Trustee, and shall, subject to any general or special direction of the court or a judge, be held and applied by him in such manner as he shall think fit for the maintenance and education or otherwise for the benefit of the plaintiff."

Under the new Rule the money is paid over in every case, with few exceptions. Since 1909 there have been several additions to the Rule to make the power of the court over costs more extensive, so that even where there is a compromise the costs may be taxed and the plaintiff fully protected.

⁷ In 1905 a short amendment extended Order XXII, Rule 15, to actions settled before trial, but provided, no means by which the court could interfere of its own motion.

When pleadings were shorn of their splendor and reduced to the bare necessities of stating the party's case, the great safeguard of an opponent became the right to ask for particulars. If a pleading states insufficient facts to enable the opponent to answer intelligently, he can apply under the summons for directions for particulars, and then for further particulars. This has the additional virtue of pinning the pleader down to a line of attack, as particulars, when delivered, are considered to be incorporated with the pleading which they amplify. This explains the Rule added in 1901 to the pleading Order:⁸

"In Probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely; and further, where it is pleaded that the testator was not of sound mind, memory and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial, and, except by leave of the court or a judge, no evidence shall be given of any further instances at the trial."

It makes obligatory the furnishing of particulars in a class of cases where they are always asked for, and defines the extent to which they must go, thus saving the expense of the customary application and the delay caused by making it. Somewhat akin to this is the change commanded in 1903 in the form of general indorsement on the writ in an action for libel. The form previously given in Appendix A to the Rules was:⁹

"The plaintiff's claim is for damages for libel."

This was all the information the writ furnished the defendant, so he was frequently without means of knowing whether he should appear and fight the action, or acknowledge himself in the wrong and apologize or settle. To remedy the fault a Rule was added to Order III¹⁰ stating

⁸ Order XIX, Rule 25A.

⁹ Appendix A, Part III, Sec. IV.

¹⁰ Order III, Rule 9.

that the indorsement should thereafter contain "sufficient particulars to identify the publications in respect of which the action is brought." As the defendant in a libel action is usually a large newspaper publisher it is obvious that the change is appreciated. Careful plaintiffs had often inserted the particulars even before the new Rule, to make assessment of damages easier if the defendant failed to appear.

Among the amendments due to the work of Lord Herschell in 1893 are two interesting extensions of the powers of chancery judges in dealing with rights in which classes of persons share, when all the members of a class are not before the court. The first is that:

"Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the court and assenting to the compromise, the court or a judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts."¹¹

There had always been power in the court, in a *suit* properly constituted, to bind the rights of some members of a class whose interests were represented by others before the court, but the power to declare a *compromise* binding was new. The other amendment is even more useful. It reads:

"In any . . . case in which an heir-at-law, or customary heir, or any next of kin, or a class, shall be interested in any proceedings, the court or a judge may, if, having regard to the nature and extent of the interest of such persons or any of them, it shall appear expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such heir, or to represent all or any of such next of kin or class, and the judgment or order of the court or judge in the

¹¹ Order XVI, Rule 9A.

presence of the persons so appointed shall be binding upon the persons so represented." ¹²

This extended to all cases a power which the court had previously exercised only in cases based upon the construction of a written instrument.

How complete is the control of the court over those who practice before it is illustrated by a Rule added in 1901. It provides a summary remedy for the clients of solicitors who retain money or securities which ought to be handed over.

"Where the relationship of solicitor and client exists, or has existed, a summons may be issued by the client or his representatives for the delivery of a cash account, or the payment of moneys, or the delivery of securities, and the court or a judge may from time to time order the respondent to deliver to the applicant a list of the moneys or securities which he has in his custody or control on behalf of the applicant, or to bring into court the whole, or any part of the same, within such time as the court or a judge may order." ¹³

An order made upon a solicitor under this Rule can be enforced like a judgment. Recent events had made some such check upon solicitors necessary, and it is curious to observe that they are considered so integral a part of the court that execution may issue against one without an action having been commenced against him.

Not all the Rule Committee's procedural innovations meet with whole-hearted approval, as the following amusing episode will bear witness. To assure defendants who have paid money into court, which has been refused by the plaintiff, that the jury will not be prejudiced by the fact of such payment, a Rule was inserted in 1893 stipulating that

"no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into court, or of the amount paid in." ¹⁴

¹² Order XVI, Rule 32(b).

¹³ Order LII, Rules 25 and 26.

¹⁴ Order XXII, Rule 22.

In consequence of this Rule if counsel mention to the jury either that money has been paid in, or the amount that has been paid, the judge will, in ordinary cases, stop the trial, discharge the jury, and make such order as to retrial as he thinks proper. But Lord Russell of Killowen, who succeeded to the Lord Chief Justiceship soon after the Rule was made, had scant sympathy with it. In two cases before him he not only refused to recognize it, but himself told the jury how much had been paid in,¹⁵ and in one of these cases he did not hesitate to express the opinion that the Rule was "foolish and inconvenient!"¹⁶

Examples from the amendments in this category could easily be multiplied, as it is the largest in point of numbers. These illustrations will suffice to point out their general trend, which is clearly towards an ampler measure of official supervision over every detail in the course of the litigation. One need not accept entire the guiding principle, to see that this category of amendments is the one most rich in suggestions which can with profit be followed out in other procedural systems.

¹⁵ Mentioned in the White Book in the footnote to the Rule.

¹⁶ *Klamborowski v. Cooke*, 14 Times Law Reports, 88 (1897).

CHAPTER XIII.

RULES UNDER SPECIFIC STATUTES.

In the third category into which the amendments since 1883 are here divided can be seen more plainly than in the others how nearly legislative the powers and functions of the Rule Committee are. It is composed of Rules issued for the operation of specific Acts of Parliament in which special duties are thrown upon the Supreme Court, and in which directions are usually inserted requiring the Rule Committee to issue such Rules. This method of legislation has the double advantage of relieving Parliament from the discussion of technical details of legal procedure, and of saving the Supreme Court procedure from inconsistencies and irregularities which might be pitched into it for the benefit of any particular Act of Parliament. Over thirty statutes since 1883 have delegated to the Rule Committee the duty to prescribe Rules to regulate legal proceedings brought under them; the list is widely varied, and only a few of them will be mentioned, to illustrate the method.

The various Finance Acts that are so prominent a feature of the collectivist legislation of the present generation create a large body of new rights and obligations, the determination of whose nature and extent often involves most important issues and very large sums of money. Parliament has provided an admirably simple means through which dissatisfied persons can obtain a judicial review of decisions made by the officials who administer these Acts; instead of the Continental method, which is to create separate administrative courts, or the American method, which is to send appeals to the

executive head of the department, the Acts very briefly provide that aggrieved persons may, in certain specified cases, appeal to the High Court under Rules to be prescribed by the High Court for that especial purpose.

Part One of the Finance Act, 1894,¹ creates the Estate Duty which is now payable upon the principal value of all property, real or personal, settled or not settled, which passes upon the death of its owner; the Act consolidates and extends previous taxes laid upon personalty and realty separately, defines the forms of property subject to the new tax, describes the manner in which the Commissioners of Inland Revenue shall determine the value of property subject to the tax, and gives directions for the manner in which the tax shall be collected. The two principal sources of dispute in the administration of the Act are the determination of value of the property, and the apportionment of the tax upon its various parts — which are both questions for the Commissioners, in the first instance, to decide. Trouble over the first of these is settled according to the following section of the Act:²

“(1) Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the Commissioners, whether on the ground of the value of any property, or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the Commissioners or such portion of it as is then payable by him, *appeal to the High Court within the time and in the manner and on the conditions directed by Rules of Court*, and the amount of duty shall be determined by the High Court, and if the duty as determined is less than that paid to the Commissioners the excess shall be repaid.

“(2) No appeal shall be allowed from any order, direction, determination, or decision of the High Court in any appeal under this section *except with the leave of the High Court or Court of Appeal*.

¹ 57 & 58 Vict., c. 30.

² § 10.

"(3) The costs of the appeal shall be in the discretion of the court. . . .

"(4) Provided that the High Court, if satisfied that it would impose hardship to require the appellant, as a condition of an appeal, to pay the whole, or, as the case may be, any part of the duty claimed by the Commissioners or of such portion of it as is then payable by him, may allow an appeal to be brought on payment of no duty, or of such part only of the duty as to the court seems reasonable, and on security to the satisfaction of the court being given for the duty, or so much of the duty as is not so paid. . . ."

Under this section the Rule Committee issued a special set of Rules early in 1895, identified as the R. S. C. (Finance Act) 1895, which provide a method of bringing proceedings, placing the arguments of both sides before the court, hearing the dispute, and making an appeal from the decision arrived at.³ By reference certain Rules from the general Orders are incorporated into the special Finance Act Rules, so the proceedings under the section are made to fit in smoothly with the other work of the court. These proceedings are before what is called the Revenue Side of the King's Bench Division — the modern remnant of the Court of Exchequer of old. Where the principal value in dispute does not exceed £10,000, the proceedings are in the local County Court, and Rules have also been issued by the County Court Rule Committee for the special purposes of the Act.⁴ The Irish and Scotch Courts charged with similar duties have also issued Rules for their execution.

As to the second source of dispute, the following section applies: ⁵

"Any dispute as to the proportion of Estate Duty to be borne by any property or person may be determined upon application by any

³ The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 1577; also in Hanson's and other works on Death Duties.

⁴ See Hanson.

⁵ § 14(2).

person interested *in manner directed by Rules of Court, either by the High Court, or, where the amount in dispute is less than £50, by a county court* for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate."

To meet the requirements of this section all that was done was to add the following to the body of the R. S. C. 1883⁶ :

"An application under Section 14(2) of the Finance Act, 1894, for the determination of a dispute as to the proportion of estate duty to be borne by any property or person shall be made by originating summons in the Chancery Division."

That amounts to a complete code of procedure for the section, as the R. S. C. give full directions for the disposition of originating summonses and provide forms to be used in connection with them.

The 1910 Finance Act⁷ introduces a form of taxation to which American legislatures have not yet been converted. It is known as Increment Value Duty; it amounts to a gift to the public revenue of twenty per cent of any increase in the value of land, upon the occasion of any sale thereof, or upon the occasion of its title passing on the death of its former owner. Where land is held upon charitable or other permanent trusts, the duty is payable upon periodical occasions as provided in the Act. Another part of the Act creates a Reversion Duty,⁸ which is payable "on the determination of any lease of land," and amounts to a levy of ten per cent. "on the value of the benefit accruing to the lessor by reason of the determination of the lease." It is designed to take in the long-term improvement leases so common in England. In addition there is created an Undeveloped

⁶ Order LV, Rule 9C.

⁷ 10 Edw. VII, c. 8.

⁸ § 13.

Land Duty of two and one-half per cent. per annum on the site value of undeveloped land.⁹

All this requires a highly technical system for valuing the different attributes of real property. The sections defining valuation treat of "gross value," "full site value," "total value," and "assessable site value," and place much stress upon the hypothetical sensibility of "a willing seller in the open market." It is not surprising that careful provision should be made in the Act for a review of administrative decisions made under it. There is set up a panel of expert referees, to whom disputes on questions of valuation and duty can be referred from the valuers who, in the first instance, compute the value. If the referee's decision is likewise unsatisfactory, an appeal can be carried to the High Court, as in the following section:¹⁰

"Any person aggrieved by the decision of the referee may appeal against the decision to the High Court *within the time and in the manner and on the conditions directed by Rules of Court* (including conditions enabling the court to require the payment of or the giving of security for any duty claimed); and Subsections two, three and four, of Section Ten of the Finance Act, 1894, shall apply with reference to any appeal."

Where the total or site value does not exceed £500 the appeal lies to the local County Court. Under this section the Rule Committee issued the R. S. C. (Finance (1909-1910) Act) 1911, assigning these proceedings to the Revenue Side of the King's Bench Division, providing for a system of mutual notices of fact and argument which amount to pleadings, and applying the ordinary rules of amendment and discovery to them.¹¹ These sections illustrate how Acts already technical in their

⁹ § 16.

¹⁰ § 33(4).

¹¹ The Rules are not incorporated with the R. S. C. 1883; they appear in the 1914 Red Book at p. 1578; also in Hanson, etc.

nature are relieved of the burden of legal procedural details which are essential to their successful operation.

An Act throwing heavy responsibilities on the High Court is the great Trustee Act of 1893, which consolidates the law as to the powers, duties, and liabilities of trustees.¹² It makes the High Court the tribunal to which applications must be directed for the appointment of new trustees, the making of vesting orders, the completion of conveyances, the payment of funds into and out of court, and sanction for sales and conveyances of property subject to the trust. To regulate the manner in which these applications should be heard and determined Order LIV B was added to the R. S. C. in 1893, without any express provision in the Act that Rules should be made. The new Order assigns all applications under the Act to the Chancery Division, and prescribes the method in which they should be presented to the court, whether by petition, ordinary summons, or originating summons. Another comprehensive consolidating statute which refers to the Supreme Court the final determination of disputes over administrative rulings is the Patents and Designs Act, 1907.¹³ Appeals lie from the decision of the Comptroller General of Patents, Designs, and Trade Marks, on questions of the extension, restoration, and revocation of patents; the Supreme Court is also specifically required to draft rules regulating applications for the extension of patents for further terms.¹⁴ Rules for these subjects, and for the conduct of actions based on patent infringement, were passed by the Rule Committee in 1908, and appear in the R. S. C. as Order LIII A.

No statute of recent years bestows greater power upon the High Court than the Companies (Consolida-

¹² 56 & 57 Vict., c. 53.

¹³ 7 Edw. VII, c. 29.

¹⁴ § 18(1).

tion) Act of 1908;¹⁵ it refers to the High Court's decision nearly all the questions which in American states are brought before special administrative tribunals like commerce and public service commissions. To take an example, sections 46 to 56 codify the law as to the right of private corporations to make reductions in their share capital; their effect is to make the reduction subject to confirmation by the court, upon showing that the rights of all shareholders and creditors will be properly protected. Later in the Act occurs this section, of general application:¹⁶

"(1) Subject to the provisions of this Act . . . *rules of procedure for the purposes of this Act, including rules as to costs and fees, may be made*

"(a) *As regards the High Court in England, by the authority having power to make rules for the Supreme Court in England. . . .*

"(2) The authority having power to make rules under this section may by any such rules repeal, alter or amend any rules made by the like authority under the Companies Act, 1862, or any Act amending the same, which are in force at the commencement of this Act."

The Act received the Royal Assent in December, 1908, and early in the following year Rules were issued to regulate the making of applications under its numerous provisions. In May, 1909, an Order was issued containing Rules applying specifically to procedure under Sections Forty-six to Fifty-six¹⁷; the Order repeals the old General Orders of the Court of Chancery on this subject, which were still standing; it contains twenty-five Rules on the preparation of the application for leave to reduce capital, the parties who must appear, the evidence which must be presented, the affidavits and advertisements which must be made, and the costs and

¹⁵ 8 Edw. VII, c. 69.

¹⁶ § 238.

¹⁷ The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 2168 and White Book at p. 2215; also in Palmer's and other works on Company Law.

fees for the proceedings; and it gives a complete schedule of forms for use in the course of the application and its final disposition by the court. A further and even wider rule-making power is conferred by the Act in respect of the procedure upon "winding-up of companies"; this power is bestowed, however, not upon the Supreme Court Rule Committee but upon the Lord Chancellor, to be exercised with the concurrence of the President of the Board of Trade.¹⁸ The Winding-Up Rules were also issued in 1909, and as they contain two hundred and twenty Rules and over one hundred Forms, they are a code of procedure of themselves.¹⁹

Payment into court is turned to a novel use in the Life Assurance Companies Act, 1896.²⁰ It frequently happens that life assurance companies, upon the death of a policyholder, are doubtful about the persons entitled to a claim upon them as beneficiaries. Rival claimants can be forced to interplead, but sometimes there is only one claimant and yet the company feels that it cannot safely pay, although it is willing to, because of the risk of possible superior claims in future, to which it would be no answer to set up payment to the prior claimant. To meet such a contingency an Act was passed in the following terms:²¹

"Subject to rules of court any life assurance company may pay into the High Court . . . any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained.

"The receipt or certificate of the proper officer shall be a sufficient discharge to the company for the moneys so paid into court, and such

¹⁸ § 237 of the Act. The Board of Trade is a Government Department corresponding somewhat to the former United States Department of Commerce and Labor. The President of the Board of Trade is a member of the Cabinet.

¹⁹ They appear in Palmer, etc.

²⁰ 59 & 60 Vict., c. 8.

²¹ §§ 3, 4.

moneys shall, subject to rules of court, be dealt with according to the Orders of the High Court."

This is practically the whole Act — an excellent instance of a statute which expresses a desire of the Legislature, leaving it to rules to be made subsequently to provide the means for its satisfaction. To clothe the skeleton with flesh the Rule Committee added Order LIV C to the R. S. C. in October of the same year. The Order limits the benefit of the Act to cases where no action is pending in relation to the policy, and prescribes the terms upon which the payment will be accepted — for instance, that

"The company shall not deduct any costs or expenses of or incidental to the payment into court."²²

It also points out the proper procedure for parties desiring to obtain payment to them of any sums so paid into court.

Under a very different Insurance Act, the High Court is charged with a similar duty to give relief to those who pay benefits — the epoch-making National Insurance Act, 1911.²³ In a schedule to that Act are enumerated the classes of employment in which persons must be engaged who are to benefit by the operation of the Act, and the Insurance Commissioners appointed under the Act are, in general, the persons who decide whether any specific employment falls within one of the classes enumerated in the Schedule. Sometimes that question is a most difficult one, and to relieve the Commissioners of their responsibility in such a case, the following section was inserted in the Act:²⁴

"The Insurance Commissioners may, if they think fit, instead of themselves deciding whether any class of employment is or will

²² Rule 2. These rules are supplemented by Rule 41(c) of the Supreme Court Funds Rules, 1905.

²³ 1 & 2 Geo. V, c. 55.

²⁴ § 66(iii).

be employment within the meaning of this Part of this Act, submit the question for decision to the High Court *in such summary manner as subject to rules of court may be directed by the court*, and the court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question, and the decision of the court shall be final."

Directions under this section form the subject of Order LV B, added to the R. S. C. in May, 1912. The Order briefly directs that such a submission should be made by proceedings instituted in the Chancery Division by an originating notice of motion, to be served by the Commissioners on the person or persons as to whom the question has arisen, and to follow the same course and be subject to the same regulations as any other originating motion in the Chancery Division.

Alterations in substantive law frequently carry with them the necessity for corresponding accommodation in procedural details. The Guardianship of Infants Act, 1886,²⁵ is a case in point. That Act increased materially the right of an infant's mother to have a voice in its guardianship. Before the Act she had no power to appoint a testamentary guardian for her infant; the Act empowers her to do so if the father is dead. It also makes her the infant's guardian if the father dies without having appointed one. A new right given her is that of nominating someone to serve after her death as guardian jointly with the father, if the latter is for any reason unfitted to be the sole guardian of the child. Finally the Act expressly provided that the Court, in making orders regarding the custody of the child, shall have regard to "the conduct of the parents, and to the wishes as well of the mother as of the father." To carry out these provisions, section 11 says:

"Rules for regulating the practice and procedure in any proceedings under this Act, and the forms in such proceedings, may from time to time be made.

²⁵ 49 & 50 Vict., c. 27.

“(a) so far as respects the High Court or Her Majesty’s Court of Appeal in England or Ireland *by Rules of Court*. . . .”

By virtue of this section the Rule Committee, in December, 1887, issued a set of thirteen Rules, cited as the R. S. C. Guardianship of Infants.²⁶ They assign to the Chancery Division applications made under the Act, apply to them specifically certain Orders of the R. S. C. 1883, and direct what evidence they must contain, and upon what persons they must be served, in order to satisfy the court before it will act.

Other statutes effecting alterations in substantive law, for which practical details were supplied by the Rule Committee, were the Bills of Sale Acts, 1878 and 1882,²⁷ and the Partnership Act, 1890.²⁸ Under the former, Rules have been issued by the Committee to provide a method for registering bills of sale — one of the salient requirements of the Acts.²⁹ The Partnership Act contains a section³⁰ conferring upon any judgment creditor of an individual partner the right to have an order charging that partner’s interest in the firm property and profits with the payment of the debt, and to have a receiver appointed to receive that partner’s share of the firm profits. The section also permits the other partners in the firm to redeem an interest so charged, or to buy it in at a sale. Directions for the practical operation of this section were added to the R. S. C. in June, 1891, as Rules 1A and 1B of Order XLVI, which define what is

²⁶ The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 1563 and White Book at p. 2140; also in Daniell’s and other works on Chancery Practice.

²⁷ 41 & 42 Vict., c. 31, and 45 & 46 Vict., c. 43.

²⁸ 53 & 54 Vict., c. 39.

²⁹ The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 1589. Also in Reed’s and other works on Bills of Sale.

³⁰ § 23(2).

sufficient service to bind the partnership for the purposes of the section.

Mention has been made of the fact that for the purpose of making rules to regulate the winding-up of companies the rule-making power is reposed not in the Rule Committee but in the Lord Chancellor, to be exercised with the concurrence of the President of the Board of Trade. Certain other large bodies of rules have likewise been issued by authorities other than the Rule Committee, under the direction of specific statutes. Of these the Rules whose application in the daily business of the High Court is most frequent are the Supreme Court Funds Rules of 1905,³¹ which are made, under the authority of various Judicature Acts,³² by the Lord Chancellor with the concurrence of the Treasury, and now consist of one hundred and eleven Rules. They constitute a complete code of directions to parties and to the Paymaster's office regulating the payment of funds into and out of court for every possible purpose, and their disposition while they are subject to the court's control. A generous appendix of forms is part of the Rules.

These examples illustrate the special service the Rule Committee is able to perform for the Legislature. It not only relieves the latter of the burden of debating purely procedural matters connected with the ordinary practice of the courts, but in every case where the creation of new substantive rights and liabilities, or the inauguration of policies throwing open wider fields of administrative discretion, makes it necessary or advisable to refer disputes to the court, the filling in of details for

³¹ These appear in the 1914 Red Book at p. 1654 and White Book at p. 1720.

³² § 18 of the Chancery Funds Act, 1872; §§17 and 30 of the Judicature Act, 1875; § 6 of the Judicature Act, 1894; § 4 of the Supreme Court Funds Act, 1883.

the regulation of legal proceedings can safely be left to the court itself; and that has the further advantage of giving the court that control over its own procedure which is essential to maintain it as a consistent and organic whole.

CHAPTER XIV.

ADMINISTRATIVE RULES.

Three categories of amendments still remain to be examined — the fourth, dealing with the duties and powers of officers of the court, the fifth, altering the time within which different steps in a litigation may be taken, and the sixth, on the subject of costs. Of these three only the last has the same attraction, from the comparative standpoint, as the three classes previously summarized, but a few samples will be presented from each, for the sake of completeness.

The amendments in the fourth category embody directions to officers of the court for the proper distribution and administration of business coming before it. There is a considerable staff of quasi-judicial officers and of clerical officials of varying degree, whose powers and duties are subject to alteration by Rules of Court. Occasionally the distribution of work among the judges themselves is made the subject of an amendment, although it is usually left to be regulated by Resolutions of the judges in each Division, as when the judges in the Queen's Bench Division issued the Resolutions of May, 1894, or the Notice as to Commercial Causes, in 1895. Two most important amendments in the R. S. C. altering the arrangement of the judges' work have already been described in a different connection — one is the creation of the linked-judge system in the Chancery Division, and the other is the creation of the Short Cause List in which a large part of the trials under Order XIV are entered to avoid delay.

One group of amendments in this category is for the benefit of the masters in the different departments of

the Supreme Court. One amendment permits any master, on the application of any party, to hear and dispose of any application in a cause which has been assigned to another master¹; this is to facilitate the speedy determination of interlocutory points when, for any reason such as illness or pressure of other work, the master to whom the cause has been assigned is not available. Another concerns Chancery masters alone²; it instructs them to report, at the beginning of each sittings, all the cases in which they consider there has been any undue delay in the proceedings before them. This is an echo of the work of the Chancery Chambers Committee in 1885, the belief then having been expressed that much of the delay in Chancery chambers was due to the laxity of solicitors themselves. Frequent amendments are made to increase or alter the powers of the King's Bench masters; two of the most useful are those which empower such masters to try issues in garnishee proceedings,³ and which extend to them the power to make charging orders, under the 1 & 2 Vict., c. 110⁴—both powers which are invoked almost every day in the master's work.

At present the assessment of damages after an interlocutory judgment is not, in actual practice, usually procured upon a writ of inquiry. The usual course is for the matter to be referred to the master who has had *seisin* of the action, to hear the evidence and assess the damages; but by virtue of an amendment made in

¹ Order LIV, Rule 9A (1888).

² Order XXXIII, Rule 8A (1893).

³ Order XLV, Rule 4 (1902).

⁴ Order LIV, Rule 12(e) (1911). If any judgment debtor has stocks or shares standing in the books of any company in his own name or in trust for him, his judgment creditor can obtain an order charging those stocks or shares with the payment of the debt, and if the debt is not paid within six months after such order, the creditor can have the stocks or shares sold to satisfy the charge.

1888,⁵ if the assessment is of a particularly involved and complicated nature it may be referred to one of the official referees, who are specially equipped for the taking of lengthy accounts, and so the master's time is not taken up.

From the King's Bench masters an appeal lies to a judge of the King's Bench Division who sits in chambers daily for the purpose. At present the King's Bench judges take the chamber work in rotation, each generally remaining there throughout a single sittings of the court. This is the result of a series of changes in Order LIV in an attempt to arrive at the most satisfactory arrangement; the procedure before the Judge in Chambers is regulated by Rules 30 to 42 of that Order, and they were recast in 1908 and 1909.⁶ There will probably be further changes in this Order, as the opinion has recently been expressed that it would be advisable to do away altogether with the appeal to a Judge in Chambers.⁷

When the revisers in 1883 gathered together the scattered strands of chancery procedure, they abolished completely the old system of administering interrogatories through the official Examiners in Chancery, a cumbersome and unsatisfactory method of getting answers; under it only the set questions could be asked, and no cross-examination was possible. Upon the retirement in 1884 of the old Examiners in Chancery a new set of officials was provided, called merely examiners and available for all Divisions of the Court. They are persons appointed by the Lord Chancellor before whom witnesses may be examined and cross-examined outside

⁵ Order XXXVI, Rule 57A.

⁶ See Chapter X, p. 146

⁷ See Appendix VIII (vol. ii, p. 236) of Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Division. Parl. Pap. Cd. 7178 (1913).

the court whenever permission is given to do so, especially in cases where expert testimony is to be taken. The method of referring examinations to these examiners, the procedure before them, the fees to be paid, and the filing of evidence taken, are all regulated by Rules issued principally in 1884, and partly in 1888 and 1900.⁸

Another group practically of great concern to the Law Courts deals with the matter of office hours and vacations, the subject of Order LXIII. This Order has been amended quite frequently,⁹ and fixes the limits of the Long Vacation, the holidays during the legal year and the daily office hours to be observed in the different departments of the Central Office. At present, most of the offices are open daily from 10.30 to 4.30, and Saturday to 1. In the courts, the Long Vacation lasts from August 1st to October 12th; the Christmas recess lasts three weeks, the Easter recess two weeks, and the Whitsun recess ten days. The offices, however, are not so generously dealt with, as they are open every day in the year except Sundays, Good Friday, Easter Eve, Easter Monday and Tuesday, Whit Monday, August Bank Holiday (the first Monday in August), Christmas Day and the next day, and the King's Birthday.¹⁰

A great administrative power regulated by Rule of Court is the proper investment of funds "in court." These often amount to very large sums, especially in the Chancery Division, and the office of Paymaster-General is one of great responsibility. The securities in which he may invest are enumerated in Order XXII, Rule 17, and the list is frequently altered by the deletion or addition of names according to the financial situation and the appearance of new issues that are officially safe.¹¹

⁸ Order XXXVII, Rules 40 to 50.

⁹ 1883, 1907, 1908, 1912.

¹⁰ Order LXIII, Rule 6.

¹¹ 1888, 1897, 1899, 1901, 1903, 1904, 1905, 1908, 1911.

The Rule applies to all "Cash under the control of, or subject to the order of the Court."

The new Poor Persons Rules of 1914¹² are the latest addition to the administrative group of amendments, as they create a new bureau to perform the functions of a Legal Aid Society, but it is too early to judge of their usefulness.

The fifth series of amendments relates to the time within which steps may or must be taken by parties in the course of an action. Under the far-reaching influence of the compulsory summons for directions, rules on time present little or no difficulty to practitioners, as there is always the possibility of obtaining from the master leave for an extension of time; in fact it is strongly felt that too great indulgence is shown in this regard, the practice being that any party will be allowed *one* extension of time at some point in the action, as of course, the costs being made costs in the cause and paid by the ultimately losing party. Quite one-fourth of the applications made to the masters in the King's Bench Division are upon these "time summonses." The power to grant such applications is contained in the following Rule:¹³

"The court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

The manifest advantages of the right to exercise such a discretion seem to offset the inconvenience it sometimes entails.

The principal time provisions in the Rules are in respect to the delivery of pleadings. At first it was not

¹² Order XVI, Part IV; Weekly Notes, January 24, 1914, p. 63.

¹³ Order LXIV, Rule 7.

compulsory for parties to issue a summons for directions — they could simply follow the times laid down in the Rules and deliver pleadings mutually accordingly. Since 1897, however, the time within which any pleading must be delivered is a matter for the master to decide upon the hearing of the summons for directions, as well as the question of whether or not there shall be any pleadings at all, so that the times stipulated in the Rules are not of any importance. The present time Rule for statements of claim, for instance, reads as follows:¹⁴

“When delivery of a statement of claim is ordered the same shall be delivered within the time specified in the order, *or, if no time be so specified*, within twenty-one days from the date of the order, unless in either case the time be extended by the court or a judge.”

But the order for pleadings commonly made includes a line to the effect that a statement of claim shall be delivered in fourteen days, and a defence ten days thereafter, so that the twenty-one days mentioned in the Rule serves no other purpose than to stand as a guide to the master's discretion when extensions are asked for. The Rule as to the time for defence is similarly worded and fixes the time at ten days,¹⁵ so there is no divergence between the Rule and the practice. Replies are very commonly put in by plaintiffs because of the great latitude of counterclaim that defendants may plead, although no reply will be allowed by the master, as a rule, where no counterclaim has been pleaded. The Rule on replies allows ten days from the defence for their delivery,¹⁶ and the order made is usually for the same period. The times stated in the first and third of these Rules were much longer under the original Rules of

¹⁴ Order XX, Rule 1(c).

¹⁵ Order XXI, Rule 8.

¹⁶ Order XXIII, Rule 2.

1883; then the plaintiff was allowed six weeks for his statement of claim and twenty-one days for his reply. The abridgment was made in 1902 when the pleading Orders were revised to eliminate the confusion caused by the newly compulsory summons for directions. The time for defence, on the other hand, was then increased from eight days to ten.

A most useful privilege allowed the plaintiff is that he may, without having to obtain leave, amend his statement of claim once at any time within ten days after the defence is delivered¹⁷; the time was cut down from twenty-one days to ten in 1905, to make it conform to the Rule on replies.

Several changes have been made in the time prescribed for interlocutory steps. The Order on chamber procedure directed that every summons must be served at least two clear days before the time when it was to be heard in chambers¹⁸; it was found that when a party desired to apply for an extension of time he was usually in a hurry, and to require him to serve two clear days' notice of his intention to apply would practically defeat the object of his application. An addition was made in 1891 to the effect that

"in case of summonses for time only, the summons may be served on the day previous to the return thereof,"

and the difficulty was no longer felt. Another alteration in the same Order was made, in the time within which appeals must be carried to the Judge in Chambers from the decision of a master.¹⁹ The Rule required that the appeal must be entered in the Judge's list within four days after the decision complained of, but there was no limit within which notice of the appeal had to be served

¹⁷ Order XXVIII, Rule 2.

¹⁸ Order LIV, Rule 4E.

¹⁹ Order LIV, Rule 21.

on one's opponent. In 1905 this was extended to five days, with a proviso that notice of the appeal must be served at least one clear day before the hearing. This assures to the respondent a fair opportunity to prepare, which previously a discourteous appellant could deprive him of by serving the notice late. A small change was made in the Order on payment into court. When a defendant paid money into court the plaintiff had four days in which to decide whether to accept the sum in satisfaction of his claim or leave it²⁰; in 1913 this was extended to seven days, to give him a little more time to think it over.

Under the English Rules, when the pleadings have reached a certain point the plaintiff, if he proposes to push his case to trial, must give his adversary a "notice of trial" and then, within forty-eight hours, enter the action for trial. Formerly he was allowed six weeks "after the close of the pleadings" within which to serve his notice of trial, but that time has been curtailed. He is now entitled to give the notice with his reply, whether there are subsequent pleadings or not, and if he fails to do so within six weeks thereafter, the defendant may either apply to have the action dismissed or may himself give notice of trial.²¹ In practice it rarely occurs that there are pleadings after the reply, so this change is not an important one. There are certain cases in which, even though the order made on the summons for directions has been for a *non-jury* trial, the defendant has the right, after receiving notice of trial, to elect that the trial *shall* be before a jury; he must then apply to the master for an order to that effect.²² When this Rule was framed in 1883, no time limit was placed upon the defendant, so he could upset his opponent by

²⁰ Order XXII, Rule 7.

²¹ Order XXXVI, Rule 12.

²² Order XXXVI, Rule 6.

delaying the application, but in 1885 the defect was corrected by requiring that the application must be made "within ten days after notice of trial has been given."

Appeals must now be entered much earlier than they were formerly allowed. The 1875 and 1883 Rules fixed the time at twenty-one days for appeals from interlocutory orders and one year for other appeals²³; in 1893 both of those limits were cut down, the former to fourteen days, and the latter to three months. And in 1913 the three months was further reduced to six weeks, so that now appeals from interlocutory orders must be entered within fourteen days, and appeals from final judgments within six weeks. This is subject to the right either of the court below or the Court of Appeal to extend the time if it sees fit—a reservation explicitly stated in the Rule in 1913 to counteract certain decisions which held that very special circumstances were required. Motions for new trials have been very largely assimilated to appeals, and this is reflected in the time allowed; previously it was ten days from the trial, not counting vacations; in 1913 it was altered to six weeks from the trial, irrespective of vacations.²⁴

The sixth and last category in the arbitrary classification here attempted contains the amendments on costs. These refer principally to the incidence of or liability for costs—a kind of question which frequently is the source of more animated discussion in an action than the principal issue itself. It is partly due to what has been called the "apothecary's bill" method of itemizing bills of costs, and partly to the fact that both solicitor and barrister are employed at so many stages of an action, that the costs for every trifling interlocutory application in the course of an action in the English

²³ Order LVIII, Rule 15.

²⁴ Order XXXIX, Rule 4.

Supreme Court are sufficient in amount to make their payment a matter of consequence, and to raise the whole status of legal costs to a plane quite disproportionate to its true relation to the rights involved. It is illuminating to notice that the Order on costs in the R. S. C. (Order LXV) is by far the longest Order of the whole seventy-two. With the footnotes it takes up one hundred and ten pages in the last number of the Red Book, and one hundred and thirty pages in that of the White Book; the average Order occupies only seventeen. However, the evil is one that has flourished for many long years and is almost taken for granted, and it is of interest to observe how the Rule Committee has endeavored to put the burden of costs where it should most justly fall, whenever there seemed reason for intervention. Only a few instances can be given here, as the subject is necessarily one requiring an intimate acquaintance with the procedural steps involved.

On the common law side (ever since the Statute of Gloucester) costs are recovered by a successful litigant from his unsuccessful opponent, but in the Chancery Division the usual order is that the costs be paid out of a fund which is the subject of dispute. The court is consequently, obliged to look at the question of the incidence of costs from a different angle than in the King's Bench Division, and to decide how best the fund itself can be protected. With this object in view, a few Rules were added among the Rules of 1893 to serve as a guide in certain puzzling situations. One is:²⁵

"The costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate unless the judge shall otherwise direct."

This warns the custodians of trust property against needless litigation, the practice being that if the claim

²⁵ Order LXV, Rule 14A.

or resistance was reasonable, the judge will "otherwise direct." The second of these Rules is more obviously beneficial:²⁶

"The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct."

This affords a just protection to the residuary beneficiaries against errors not their own. The third Rule is a complement to the second:²⁷

"Where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred or is likely to occur in ascertaining the persons entitled to the other shares, the court or a judge may order or allow immediate payment of their shares to the persons ascertained without reserving any part of their shares to answer the subsequent costs of ascertaining the persons entitled to the other shares."

In a country where it is so common for property to be distributed several generations after the method of distribution is marked out, these two Rules are an unmixed blessing to waiting distributees.

Probate costs are also charged upon the estate of the testator, and similar questions sometimes arise in the Probate Division. A most salutary Rule, made part of the one just above described, in 1904, is:²⁸

"In any probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what *portion or portions* of the estate such costs shall be paid, and such costs shall be paid accordingly."

In one case, for instance, it was decided that the costs of proving the will should be charged upon certain realty, the corpus of the estate, and not paid by the life tenant, the judge throwing out the suggestion that the amount might be raised by a mortgage upon the prop-

²⁶ Order LXV, Rule 14B.

²⁷ Order LXV, Rule 14C.

²⁸ Order LXV, Rule 14D.

erty.²⁹ In another case, the costs of all parties were ordered to be paid out of the residuary share of four defendants (there being six residuary beneficiaries), these four defendants being held to have caused the litigation.³⁰ Another amendment on probate costs is on a matter connected with pleading. The R. S. C. 1883 continued a practice of the old Ecclesiastical Courts whereby a caveator had the right to demand that the *proper execution* of the will be strictly proved, without having to pay the costs of the proceeding. The Rule was³¹:

"In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been, under similar circumstances, according to the practice of the Court of Probate."

But this left it open to parties to contest a will wantonly and force the executors to prove its proper execution at the expense of the estate, whether there was reason for it or not. The loophole in the generosity of the old practice was stopped by an amendment to the Rule in 1898 which makes it end as follows:

"and he shall thereupon be at liberty to do so, and shall not in any event, be liable to pay the costs of the other side, *unless the judge shall be of opinion that there was no reasonable ground . . . for opposing the will.*"

A few months later an opportunity came to apply the new Rule. In *Spicer v. Spicer*,³² the President of the Probate Division (Sir Francis Jeune) said:

"The case is an example of the precise abuse which the new Rule was intended to prevent."

and ordered the defendants to pay the executors' costs.

²⁹ *Dean v. Bulmer*, [1905] Prob. D. 1, *per* Jeune, P.

³⁰ Mentioned in the headnote to *Dean v. Bulmer*.

³¹ Order XXI, Rule 18, before amendment.

³² [1899] Prob. D. 38 (November, 1898).

Several of the costs amendments apply more particularly to questions common to the King's Bench Division. It has been described how a defendant may pay money into court, as a means of compromise, "with a denial of liability." If the plaintiff accepts the money so paid, he must withdraw his action; if, however, he rejects it and goes on with the action, certain consequences as to costs ensue. If he eventually wins a verdict greater than the amount paid in, the defendant of course gets no benefit from the payment in. But if the plaintiff recovers *less* than was paid in, the defendant ought not to be liable for any costs incurred subsequently to the time of payment in. The old practice was that in such a case the defendant was liable only for the costs of issues on which he failed; this was not a rule of court but a rule of practice confirmed by a long line of decisions.³³ But this benefit was wholly illusory; the principal issue would usually be that of *liability*, and the issue of *amount due* only a minor one. The defendant, therefore, although he had actually paid in a sum greater than he was found to owe, would be obliged to pay the costs on the principal issue in the action, because that was an issue on which he failed. To relieve defendants of this, and to furnish a real inducement for them to pay money into court so as to avoid further litigation, the following sentence was added to the R. S. C. in 1913:³⁴

"A plaintiff who does not accept money paid into court with a denial of liability, but proceeds to trial and does not recover more than the sum paid into court, *shall not be allowed his costs of the issues as to liability* unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in."

Under this Rule the defendant will have practically no costs to pay after the time of payment into court.

³³ Cited in the footnote to Order XXII, Rule 1, in the White Book.

³⁴ Order XXII, Rule 6(c).

Similar in character is an addition made earlier to the interpleader Order. When a sheriff, who had by mistake seized goods of some one other than the debtor, was notified by the execution creditor to release the goods, there was always a question about how the costs of seizing the goods and of releasing them should be distributed; the sheriff would contend he must be completely reimbursed by the execution creditor, while the latter would argue the sheriff ought to bear the costs of his own mistake. To put an end to the difference a Rule was made in 1889 dividing the liability. The Rule states that if, upon hearing of the third party's claim, the execution creditor notifies the sheriff that he admits it, "he shall only be liable to such sheriff or officer for any fees and expenses incurred prior to the receipt of the notice admitting the claim." ³⁵

The question of execution involving a third party was also the cause of an amendment to the Order on attachment of debts. Garnishee proceedings under the R. S. C. are aimed principally at the attachment of *debts* due the judgment debtor. In cases where the garnishee disputed his liability, there was a diversity of opinion as to how the costs of proving it should be borne — whether they should come out of the sum recovered, or fall upon the execution creditor, or upon the garnishee. To settle this a Rule was added in 1901, and now the practice is that, as regards the costs of the judgment creditor, they

"shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order, and in priority to the amount of the judgment debt." ³⁶

An amendment on costs which applies to all classes of actions and is constantly being acted upon was made to Order LXV, Rule 23, in 1902. Previously the Rule allowed the masters, when they directed the costs of any

³⁵ Order LVII, Rule 16.

³⁶ Order XLV, Rule 9.

interlocutory application to be paid by any party, to fix and order a lump sum to be paid, to save the expense and delay of taxation. In 1902 the Rule was extended to cover the costs of the *whole* action, and it is often applied especially in smaller actions of the running-down type, and in actions entered in the Short Cause List where with the court's approval settlements are often effected before trial.

This conspectus of the amendments since 1883 does not pretend to have mentioned all the changes of prominence and importance. The effort has been to select, from the various types to which they conform, such amendments as will illustrate, to one not closely familiar with the R. S. C., the wide range of the Rule Committee's powers and the gain in flexibility to be derived from entrusting the regulation of civil procedure to a professional body rather than to a well-intentioned but over-worked legislature.

CHAPTER XV.

RULE-MAKING IN THE COUNTY COURTS.

No account of the development of the rule-making power in English courts of justice would be complete which failed to mention the great influence upon it exerted by the introduction and growth of the present County Court system. That system is the creation entirely of statute, and in the courts comprised in it were first introduced as experiments many of the reforms which ultimately found their way into the procedure first of the Superior Courts at Westminster and later of the High Court itself. The early local courts of common law origin had practically fallen into disuse by the beginning of the nineteenth century, and the unbearable expense and delay of the Superior Courts made the recovery of small amounts almost impossible. In response to the popular clamor stirred up by this denial of justice, an Act of Parliament in 1846¹ divided England and Wales into districts, in each of which a local court was to be held for the recovery of debts and damages up to £20. The courts were given the name of County Courts, and succeeded from the very beginning in attracting an enormous volume of business; their procedure was devoid of the extravagant science of pleading in which the Superior Courts were tied up, and most of their trials were before a judge alone without a jury. Their popularity and practicability gave an added impetus to the agitation begun earlier by Bentham's writings, and hastened appreciably the appointment of the Royal Commissions whose Reports resulted

¹ 9 & 10 Vict., c. 95.

in the Common Law Procedure Acts of 1852 and 1854. Although the County Courts, after their initial success, suffered for a number of years from being made the subjects of a certain amount of political jobbery, they eventually emerged from the shadow, once more won popular esteem, and have since grown in authority from year to year. A long line of statutes has gradually widened and extended their jurisdiction until to-day they can hear (with certain exceptions²) all cases where the debt or damages claimed do not exceed £100, or where the annual rental of the land involved does not exceed that amount; they have jurisdiction to a certain extent in equity, bankruptcy, and admiralty, and they have exclusive jurisdiction over proceedings which under many statutes are assigned to them, the most important being those under the Workmen's Compensation Act, 1906.³ They can also, under the Companies (Consolidation) Act, 1908,⁴ wind up any company whose paid-up capital is less than £10,000. Appeals lie from them to the High Court, and in some cases direct to the Court of Appeal.

There was a consolidation of the County Courts Acts in 1888,⁵ which is the present statute governing their work and organization.⁶ England and Wales are now (by Orders in Council) divided into some 500 County Court Districts, which in turn are grouped into 54 Circuits, which are traveled by 55 County Court judges. The judges are appointed by the Lord Chancellor for life; they must be barristers of at least seven years' standing, and receive a salary of £1,500 per annum, in addition to travelling expenses. Judges may be, and not infre-

² Such as actions for defamation or for infringement of patents.

³ 6 Edw. VII, c. 58 (strictly not the Court's jurisdiction).

⁴ 8 Edw. VII, c. 69.

⁵ 51 & 52 Vict., c. 43.

⁶ As amended in 1903; 3 Edw. VII, c. 42.

quently are, transferred by the Lord Chancellor from one Circuit to another; the practice is to fill vacancies in the metropolitan courts by transfers from the country, new judges being assigned to provincial Circuits. There is no instance in which a County Court judge was promoted to fill a vacancy in the High Court — the two systems are independent organizations. There has in recent years been some effort to abolish the circuit system of the High Court by increasing the County Court jurisdiction so as to make the local courts branches of the High Court, with a right of appeal to London, but it will probably be many years before any such step is taken.

From the very beginning procedure in the County Courts was a subject expressly reserved for regulation by the judges themselves. In the Act of 1846 the power to make Rules for proceedings in the new courts was vested in five judges of the Superior Courts at Westminster, so that there might be no delay in opening for business.⁷ They were given the power to draft all necessary Rules and forms and to amend them from time to time. After a few years, the local courts being then well started, a new Act in 1849 slightly extended their jurisdiction and the course of rule-making was altered by enacting that a committee of five County Court judges themselves should have the power to make Rules, subject to the approval of three judges of the Superior Courts, all named by the Lord Chancellor. They were given the power:⁸

"To frame such general Rules and Orders as to them shall seem expedient for and concerning the practice and proceedings of the courts holden under the said Act (of 1846), and for the execution of the process of such courts, and in relation to any of the provisions of the said Act as to which there may have arisen doubts or have been conflicting decisions in the said courts."

⁷ Sect. 78.

⁸ 12 & 13 Vict., c. 101, s. 12.

The last clause was inserted to allow the judges to clear up doubts in cases where the jurisdiction under the Act was not clear, as there was originally no appeal from the County Courts to the Superior Courts. The concluding words of the section are of especial interest:

"Such of the Rules as shall be so approved by such judges of the Superior Courts shall forthwith after the approval thereof be laid before both Houses of Parliament; and any such Rule or Order so approved shall from and after the expiration of such time as last aforesaid be of the same force and effect as if the same had been enacted by the authority of Parliament."

This foreshadows the practice of expressly delegating power to settle details in legislation, which, after growing into its present form under the Judicature Acts, has reached such proportions that the Statutory Rules and Orders annually issued under the authority of Acts of Parliament far exceed in volume the Acts themselves. In 1852 the powers bestowed in the Act of 1849 were extended to include the power:

"To frame a scale of costs and charges to be paid to attornies in the county courts, to be allowed as between solicitor and client, and as between party and party."⁹

By 1856 the County Court system was sufficiently established to be set entirely upon its own legs, free of supervision by the Superior Courts. In the Act of that year, making certain extensions in the jurisdiction, one section added to the dignity of the County Court rule-makers by providing that thenceforth the Rules and amendments should be submitted not to judges of the Superior Courts but to the Lord Chancellor, who might "allow or disallow or alter the same."¹⁰

For nearly thirty years Rules were made and issued under that section by the County Court judges, but in 1884 one of the regularly recurring Judicature Acts

⁹ 15 & 16 Vict., c. 54, s. 1.

¹⁰ 19 & 20 Vict., c. 108, s. 32.

restored the old supervision by enacting that all rules made for inferior courts of civil jurisdiction should be subject to the concurrence of the Rule Committee of the Supreme Court; it further empowers the latter body to alter or annul any existing or proposed Rule

"if, after communication with the judge or other person by whom such Rule or Order was made, it shall think fit to do so."¹¹

The rule-making section of the present County Courts Act consolidates into one declarative section the provisions of the Act of 1856, the power to regulate costs bestowed in 1852, and the concurrence required by the Act of 1884.¹²

Under the powers conferred in these statutes, and owing to the constant broadening of jurisdiction, there have been more than half a dozen complete revisions and consolidations of the code of County Court Rules in the sixty odd years of their history. The first Rules, issued under the Act of 1846, were brief directions explaining how to take advantage of the new facilities offered to suitors by the Act. They contained 52 Rules and an Appendix of 37 Forms, and were drafted by Sir Frederick Pollock, Chief Baron of the Exchequer, Sir William Erle, Sir C. Cresswell, and Sir E. V. Williams, of the Common Pleas, and Sir William Wightman, of the Queen's Bench.¹³ These Rules sufficed to start the County Courts upon their career, but when, by an Act of 1850,¹⁴ their jurisdiction was increased from £20 to £50, it was necessary to issue a more comprehensive set of Rules and to cover all the procedural matters that had come up for decision in the interim. In July, 1851, the Committee of five appointed by Lord Chancellor

¹¹ 47 & 48 Vict., c. 61, s. 24.

¹² County Courts Act, 1888, sec. 164.

¹³ The Rules are reprinted in 8 Law Times, 498 (March 6, 1846). See also Paterson's County Courts Act, 3d ed. (London, 1846).

¹⁴ 13 & 14 Vict., c. 61.

Cottenham issued the first revision of the Rules.¹⁵ In the process the code had grown from 52 Rules to 210: it has maintained that rate of progress ever since.

In December, 1856, after the supervision of the County Courts was discontinued by the Act of that year, a fresh revision was made — the second one — but there was no material alteration in bulk.¹⁶ This revision included many improvements based upon suggestions made by the County Courts Royal Commission of 1853–55, whose Report on abuses in the County Court system brought about the Act of 1856, and put an end to the unsavory political associations that had begun to hamper the work of the courts.¹⁷ The next change was in January, 1864, when there was a revision of the various Rules and proceedings brought in the County Courts under the Bankruptcy Act, 1861¹⁸; this was an addition of 78 Rules to the code. A large addition was made in

¹⁵ See 17 *Law Times*, 134 (July 12, 1851); also Cox and Lloyd's County Court Practice, 4th ed. (London, 1851). The Rules were drafted by Mr. Serjeant Dowling, Robert Brandt, James Espinasse, C. J. Gale, and William Furner (the five judges), and approved by Sir John Jervis, Chief Justice of the Common Pleas, Sir William Erle, and Baron Martin.

¹⁶ The five judges were Mr. Serjeant James Manning, John Herbert Koe, Q.C., Edward Cooke, John Worlledge, and William Furner. The Rules are reprinted in 28 *Law Times*, 190 (December 27, 1856).

¹⁷ The Commission was appointed by Lord Brougham (the "Father of Law Reform"), September, 1853, and reported March 31, 1855. The report appears at length in 25 *Law Times*, 60, 73, 96, 109, 119, 138, 162 and 178, as well as in the Parliamentary Papers for the year. It is signed by Sir John Romilly, Master of the Rolls, Sir William Erle, and Sir William Crompton of the Queen's Bench, Sir Henry Keating, later Solicitor-General and a Justice of the Common Pleas (the author of the Bills of Exchange Act, 1855), Henry Fitzroy, John Herbert Koe, and A. S. Dowling, judges of County Courts, J. Pitt Taylor, and J. R. Mullings.

¹⁸ 24 & 25 Vict., c. 134. Signed by J. B. Dasent, D. D. Heath, J. Worlledge, Rupert A. Kettle, and William Furner. The Rules are reprinted in 39 *Law Times*, 102 (January 2, 1864).

October, 1865, in consequence of the County Courts Act of that year,¹⁹ which extended the jurisdiction to include matters of an equitable nature. The judges then issued a code of equity practice, consisting of 153 Rules divided into 24 Orders, modeled upon the Consolidated Chancery Orders of 1860.²⁰

In 1867 the jurisdiction was further extended, notably to include ejectment among the Courts' powers.²¹ To carry these extensions into effect, and also to bring together the many sets of Rules that then were in use, a consolidation of all the Rules was effected and published in January, 1868.²² It came up to a total of over 450 Rules, more than double the size of the first revision of 1849, but it covered all three branches of the jurisdiction — common law, bankruptcy, and equity.

This code was in use until the Judicature Acts of 1873 and 1875 eliminated the distinctions between law and equity as administered in the Superior Courts, and those distinctions had then to be abolished in the County Courts as well, to make their practice conform to that of the courts above. It is interesting to see how little legislation was needed to accomplish this: one short section in the former Act²³ extended to the County Courts the

¹⁹ 28 & 29 Vict., c. 99.

²⁰ See 40 Law Times, 581, 591, 603 (1865).

²¹ 30 & 31 Vict., c. 142.

²² See Pollock's County Court Practice (London, 1870).

²³ 36 & 37 Vict., c. 66, pt. vi, s. 89: "Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall, in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal . . . , in as full and ample a manner as might and ought to be done in the like case by the High Court."

power to apply both legal and equitable principles in giving relief, and the Rule Committee simply went over the Rules of 1868 making the changes called for by the new order of things. At the same time they incorporated three sets of Rules which had been issued in the interval, of which the longest was a set of 77 Admiralty Rules of 1869. The Committee issued the new code in October, 1875, amounting all told to a little over 500 Rules.²⁴ In form it presented a considerable change from the previous code, in that it was all divided into 40 Orders, after the style of the Rules of the Supreme Court of the same year; it also copied *verbatim* many of the Supreme Court Rules so as to make the County Court practice approximate as closely as possible to that in the higher courts on such subjects as parties and joinder of claims. Like the Rules of the Supreme Court, too, it amalgamated the previously separate Common Law and Equity Rules, dropping all distinctions between the two.

After this fourth revision the code remained practically unaltered for another decade. There were occasional additions to it, sets of amendments in 1876, 1880, and 1883, but no real activity in rule-making, partly because there was little statutory alteration made in the powers of the court. During this period the Rule Committee of County Court judges was more or less in abeyance, anything that was needed in the drafting line being supplied by the head of the County Courts Department in the Treasury²⁵ — the Department which has always had the administrative control of the County Courts. But

²⁴ Reprinted in *Weekly Notes*, 1875, pp. 489–572. The appendix contains 261 Forms. See also Pollock's *County Court Practice* (London, 1876).

²⁵ Then Henry Nicol, himself a member of the Bar; he was also the Lord Chancellor's secretary for County Court work, and joint editor of successive editions of Pollock's *County Court Practice*.

in 1884 Mr. (now Sir) Mackenzie Chalmers, the draftsman of the Bills of Exchange Act, 1882, became a judge of County Courts. Fresh from his work on the Statute Law Revision Acts of 1881 and 1883, and with the example of the 1883 Supreme Court Rules revision before him, he set about a thoroughgoing revision of the County Court Rules, which were becoming threadbare in many places. In this he was assisted by George Washington Heywood, the judge of the Manchester County Court, and they both worked under the supervision of the Lord Chancellor's secretaries, Sir Kenneth Muir Mackenzie and Henry Nicol. In April, 1886, the new revision was published — the fifth since 1846.²⁶ The usual increase in bulk was one result of the treatment: there were now 52 Orders, containing over 700 Rules, and the Appendix of Forms had grown to 351 from the original 37 of 1846.

However, the revision of 1886, though prepared with great care and completeness, had the shortest life of any of the revisions. Two years later Parliament passed the consolidating County Courts Act which is the present governing law, and in that Act so many slight alterations were made in the powers and duties of the County Courts that it was necessary to go completely over the Rules to accommodate them to the new law. Very little substantive change was made in them, only about 15 new Rules being added, and they were republished the following January as the County Court Rules, 1889 — the sixth revision of the code.²⁷

From 1890 to the present has been a period of unexampled activity in County Court rule-making, as the code has almost doubled in size, and has experienced

²⁶ See the Annual County Courts Practice for 1887. This work has been published annually since 1881. The Rules are also reprinted in Weekly Notes, 1886, Supplement (165 pages).

²⁷ See Annual County Courts Practice, 1890.

another general revision. This is due principally to the unbroken chain of statutes which continue to add special powers to, and throw special duties upon, the County Courts, and each of which requires a special set of Rules to bring proceedings under it into line with the rest of the Court's procedure. Prominent among these is the Workmen's Compensation Act, 1906,²⁸ which accounts for 100 Rules and 80 Forms; the regulations for the Tithe Act, 1891,²⁹ run to 58 Rules and 35 Forms; the Finance Acts, 1894-1910,³⁰ brought in 28 Rules; 28 more are for the Stannaries Court (Abolition) Act, 1896³¹; and the list of such Acts includes a dozen more. Of the 55 Orders in the present code, Orders XXXVIII to LII inclusive all deal with subjects of special statutory jurisdiction. Another reason for the continued growth of the Rules is that first in Sir Mackenzie Chalmers, and later in Sir Lucius Selfe³² (the present Chairman of the Rule Committee), the Committee has had at its command the services of draftsmen of the first order, who have endeavored to keep the Rules constantly up to the demands made upon them. In 1903 a County Courts Act raised the limit of jurisdiction from £50 to £100, and that was made the occasion for a complete revision of the Rules, for which Sir Lucius Selfe was mainly responsible. The County Court Rules, 1903, amounted to over 1,000 Rules; more than 200 have been added since

²⁸ 6 Edw. VII, c. 58.

²⁹ 54 & 55 Vict., c. 8. These Rules all appear in the Annual and Yearly Practices.

³⁰ 57 & 58 Vict., c. 30; 59 & 60 Vict. c. 28; 10 Edw. VII, c. 8.

³¹ 59 & 60 Vict., c. 45.

³² A judge of County Courts since 1882. He was, like Sir Mackenzie Chalmers, an accomplished draftsman before going on the bench. The latter left the County Courts in 1894, when he went to India as the law member of the Governor-General's Council, and his place in the Rule Committee was taken by Sir Lucius Selfe

and a consolidation has just been made of all the amendments published since 1903.³³

Through all these changes in the Rules the Rule Committee itself has, unlike the Committee in the Supreme Court, undergone no change in its constitution. Since 1849 it has consisted of five County Court judges,³⁴ and since 1884 its Rules have been published, after being "allowed" by the Lord Chancellor, with the concurrence of the Rule Committee of the Supreme Court. As its powers include local courts over the whole of England and Wales it may be of interest to describe its methods. It has varied sources of information as to alterations needed in the Rules, the first among them being the corps of County Court judges itself. The judges frequently communicate individually with members of the Rule Committee, giving notice of local conditions which call for special attention from the rule-makers. The Committee, themselves judges, are able to appreciate the force of suggestions so made, not only as the members are drawn partly from country and partly from town circuits, but as most of them have had experience, through transfers, of more than one locality, so that they are qualified to view the County Court system as a whole instead of merely from the point of view of their own particular courts. All the judges come together about once a year in lighter vein, and on that occasion also there is an opportunity for an exchange of views.

³³ S.R.O. 1914, No. 1299/L. 29, County Court Rules, 1914 (no. 3). The whole body of Rules is now styled "The County Court Rules, 1903 and 1914."

³⁴ The present members are Their Honours Sir William Lucius Selfe, William Cecil Smyly, K.C., R. Woodfall, T. C. Granger, and H. Tindal Atkinson. Judge Smyly is the present editor of the *Annual County Courts Practice*, and Judge Woodfall of the *Yearly County Courts Practice* (published annually since 1897).

Many suggestions come to the Rule Committee from the County Court registrars. The registrars are quasi-judicial officers whose functions are similar to those of the masters in the High Court. There is one registrar to each County Court district, so there are about 500 of them in all. Each registrar keeps the accounts in his court, issues summonses, gives judgment in undefended causes, grants all ordinary interlocutory applications, taxes costs, and generally represents the judge while the latter is away.³⁵ Except in populous centres, the judge sits usually only one or two days a month, the registrar acting for him the rest of the month. In each circuit the registrars are appointed by the judge, and they must be solicitors of at least five years' standing. They receive salaries based upon the number of actions annually commenced in the district, the lowest being £100 per annum, the highest £1,400. Except where the volume of business is of the largest they are permitted to continue their practice as solicitors.³⁶ They are therefore peculiarly well placed to observe defects in the Rules and to transmit suggestions for improvements. Most of them are in daily touch, through their right to practice, with the litigants themselves, and their duties in regard to interlocutory proceedings oblige them to be familiar with every word of the Rules affecting matters that come before them. There is an Association of County Court Registrars, to which practically all the registrars belong, and one of the functions of the Association is to serve as an official mouthpiece for registrars all over the country in the matter of improvements to the Rules. The Association frequently communicates to the Rule Committee specific recommendations in regard

³⁵ For a fuller account of County Court organization and procedure see articles in 64 *University of Pennsylvania Law Review*, February to April, 1916.

³⁶ The matter is regulated by secs. 25-45 of the Act of 1888.

to Rules it has considered. It also maintains a Standing Committee to advise registrars upon difficult points of practice, and to assist in making procedural decisions uniform throughout the country.³⁷

Still a third source is the lay public which, by a notice in the Law List, is invited to correspond with the secretary of the committee with a view to airing complaints about the general administration of the County Courts and of the Rules, and often avails itself of the opportunity so offered. The secretary is also the Permanent Secretary to the Lord Chancellor,³⁸ a position which inspires confidence in the popular mind and assures some measure of executive responsibility for attention to complaints.

As solicitors have a right of audience in the County Courts their official organizations take at least as much interest in County Court procedure as they do in that of the Supreme Court, and provincial Law Societies often discuss special topics therein at their annual meetings. Commercial bodies also give expression, from time to time, to the views of the mercantile community when new difficulties in the collection of debts arise.

Although the concurrence in new Rules required of the Supreme Court Rule Committee is usually given without question, and is largely a matter of form, it has been occasionally refused for the reason that the Rules submitted were apparently *ultra vires* of the County Courts Committee, and the right has been exercised to alter the proposed Rules so as to bring them within

³⁷ See Law Journal, March 20, 1915, for an account of one of the annual meetings.

³⁸ Sir Kenneth Muir Mackenzie, G.C.B., K.C., upon his elevation to the peerage in June, 1915, was succeeded by Sir Claude Schuster.

the powers granted in the Acts. This matter of the limits of the rule-making power is therefore a greater consideration with the County Courts Rule Committee than it is with the Committee in the Supreme Court. No Supreme Court Rule has ever been declared *ultra vires*, either by Parliament or by the Court of Appeal; several County Court Rules have, on the other hand, even after surviving the concurrence required in the Act, been pronounced *ultra vires* in the course of litigation in the Court of Appeal.³⁹ In such a case the damage is easily repaired by a new Rule drawn to conform with the decision.

For some reason the terms of the Rules Publication Act, 1893, are considered not to include the Rules made for County Court procedure, so there is no publication of such Rules in advance of their actual promulgation, as there is in the case of Rules of the Supreme Court. Each set of Rules, as issued, is published under a separate number in the Statutory Rules and Orders, and is usually reprinted in all the legal journals. Of late years it has been the custom of the County Courts Rule Committee to prefix to its sets of new Rules a few explanatory paragraphs, mentioning the reasons for the amendments, and frequently giving the sources from which they are drawn. This serves a most useful purpose in rendering the meaning and intention of new Rules clear to practitioners.⁴⁰

Besides the County Courts there are about a dozen local inferior courts of record which are survivals of ancient charters granted to many cities and boroughs,

³⁹ Half a dozen such decisions are cited in the note to sec. 164 of the Act of 1888, in the Annual and Yearly County Courts Practices.

⁴⁰ For examples see Rules of April, 1913, in Weekly Notes, 1913, Part II, p. 213 (April 19, 1913); Rules of July, 1912, in Weekly Notes, 1912, Part II, p. 355 (August 31, 1912).

and have power to exercise jurisdiction within certain limits. The most active of these are the Mayor's Court of the City of London, the Court of Passage of Liverpool, the Salford Hundred Court in Manchester, and the Oxford University Chancellor's Court; there are special Acts confirming the powers of each of these four courts,⁴¹ and the first three named hear a great many more actions than are conducted in the average County Court. In addition to these four there are eleven others which have no special Acts to confirm their jurisdiction; their names include such picturesque euphonies as the Romsey Court of Pleas, the Norwich Guildhall Court, the Exeter Provost Court, and the Bristol Court of Tolzey and Pie Poudre. In these courts the rules of procedure are in each case framed by the judge of the court, subject to the concurrence of the Rule Committee of the Supreme Court. In the Mayor's Court at London many relics of the Common Law Procedure Acts still flourish.⁴²

Certain matters of a civil nature are capable of being dealt with at courts of petty sessions, which are courts not-of-record, held by justices of the peace. These include disputes between master and servant or between members of friendly societies, actions to recover not over £5 for injury done to the plaintiff's cattle by the defendant's dog, affiliation orders (for the maintenance of an illegitimate child by its putative father), and judicial separations under the Summary Jurisdiction (Married Women) Act, 1895.⁴³ To regulate procedure in these

⁴¹ 20 & 21 Vict., c. 157 (1857); 56 & 57 Vict., c. 37 (1893); 31 & 32 Vict., c. 130 (1868); 25 & 26 Vict., c. 26 (1862).

⁴² A treatise on the procedure of the Mayor's Court is Glyn & Jackson: *The Mayor's Court Practice* (London, 1910). Some ancient local courts have perished for want of business without formal abolition, *e.g.*, the Court of Record of the Borough of Southwark: see the Second Report of the Royal Commission on Public Records, 1914, at p. 47.

⁴³ 58 & 59 Vict., c. 39.

matters rules are prescribed by the Lord Chancellor, under the power conferred in the Summary Jurisdiction Act, 1879.⁴⁴ The present Rules are those issued by Lord Herschell in 1886.⁴⁵

⁴⁴ 42 & 43 Vict., c. 49, s. 29.

⁴⁵ See Weekly Notes, 1886, pp. 399-413; also 30 Solicitors' Journal, 650, 705 (1886).

CHAPTER XVI.

RULE-MAKING IN THE COURTS OF THE EMPIRE.

The rule-making system developed by the English Parliament for the regulation of civil procedure was an experiment in legislation which has met with unbounded success. Not only has it been the opening wedge for an ever-increasing delegation of quasi-legislative powers to executive and judicial authorities (thus relieving Parliament of a multitude of statutory details), but it has been copied in the judicial system of practically every law-making unit in the widespread British Empire. Its general adoption shows that it has the merit not only of making procedure flexible and responsive wherever it is in force, but also of being suited to the most widely divergent local conditions. Some of the jurisdictions which have adopted it are populous modern industrial communities, while others are pioneer settlements only just maturing into the dignity of established institutions. With the exception of half a dozen scattered colonies, procedure is no longer regulated by statute anywhere in the Empire, but is subject altogether to Rules of Court alterable by the local judges with the approval of the local executive.¹ In five governments the legislature has

¹ In Hong Kong, the Straits Settlements, Barbados, and St. Lucia there is a statutory Code of Civil Procedure, drawn, however, very largely from the English R. S. C. In Quebec and in the Seychelles the Code of Civil Procedure is French; in Malta it is Italian. In Prince Edward Island and in New South Wales the procedure is regulated largely by scattered statutes, and only to a small extent by Rules of Court, as in England under the Common Law Procedure Acts. Common law and equity are still administered separately in Prince Edward Island, New South Wales, Barbados, and Tasmania.

added to the judges several practitioners who share the rule-making power, as in the English Rule Committee,² and in one other there is a requirement, as in England, that all statutory Rules must be published in draft in advance of their actual promulgation.³

From a comparative point of view an inspection of the numerous Acts and Ordinances which have brought about this result is of interest, as it reveals many variants from the original model,⁴ some of which are not without instructive value.

Ireland. — The judicature of Ireland, though entirely independent of that of England, is built up on very similar lines. In 1877 a Judicature Act⁵ introduced into Ireland all the reforms effected in England by the Acts of 1873 and 1875, so that there is now a consolidated Supreme Court in Dublin. The Irish Act, like the first English one, gave the power to make Rules of Court to a majority of all the judges of the Supreme Court. The clause reads⁶:

"The Lord Lieutenant may . . . by Order-in-Council, made upon the recommendation of the Lord Chancellor, the Lord Justice of Appeal, the Chief Justice, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron, or any three of them, and of the other judges of the several Courts intended to be united and consolidated by this Act, or of a majority of such other judges, make rules, to be styled Rules of Court, for carrying this Act into effect," *etc.*

The more compact Rule Committee, containing a part only of the judges, as established in England by the Acts of 1876 and 1881, has never been copied in Ireland;

² Ireland, India, Ceylon, Newfoundland, and Ontario.

³ The Commonwealth of Australia.

⁴ The English rule-making system is governed at present by s. 17 of the Judicature Act, 1875, s. 19 of the Judicature Act, 1881, s. 1 of the Judicature Act, 1909, and the Rules Publication Act, 1893.

⁵ Judicature (Ireland) Act, 1877, 40 & 41 Vict., c. 57.

⁶ S. 61.

but in 1897 the Irish did copy the English Act of 1894⁷ by adding three practitioners to the rule-recommending body:⁸

"The persons upon whose recommendation the Lord Lieutenant may make, alter, or annul rules . . . shall include the President of the Incorporated Law Society of Ireland, and two persons (one of whom shall be a practising barrister) to be appointed for the purpose by the Lord Chancellor, by writing under his hand, for such time as may be specified by him."

The practice, as under the English Act, has been that both of the two other persons appointed have been practising barristers; their appointment has usually been for a period of two years, subject to renewal with their consent. There is no pecuniary emolument attached to membership in the body. The subsequent English Rule Committee Act of 1909 has not yet been copied by the Irish.⁹ As at present constituted the Irish rule-recommending body consists of seventeen persons, of whom three are engaged in practice. Of these, one, the President of the Law Society, changes annually, and another, the Lord Chancellor, changes according to the political color of the Government at Westminster. The others are practically all life members, as the barrister members are often promoted to judgeships.

The powers of the Irish Rule Committee, if it may be so styled, are far more extensive than those reposed in the Rule Committee in England. Several branches of procedure for which in England rules are prescribed by authorities other than the Rule Committee are entrusted to the Irish Committee. It is probably for this reason that, although in England the Rule Committee is itself

⁷ 57 & 58 Vict., c. 16, s. 4.

⁸ Judicature (Ireland, No. 2) Act, 1897, 60 & 61 Vict., c. 66, s. 12.

⁹ The wishes of the Irish bench and bar are approximately represented in the present judicature legislation, as most of it has been drafted upon suggestions from Dublin.

the authority which issues the Rules, in Ireland the "recommendations" of the Committee must be ratified by an Order in Council before they have the force of law. The most important of these are proceedings in bankruptcy and in winding-up of companies,¹⁰ for both of which the Board of Trade has been given the power to make a considerable body of Rules in England, and divorce and probate proceedings, which in England are regulated by the President of the Probate Division alone. The Irish Rules are also more detailed in regard to proceedings in the law of landlord and tenant, as the Irish conditions differ so greatly in this regard from the English. There is, however, one limitation upon the Irish committee's discretion, in that it is required to pay attention to the state of procedure in England, in the exercise of its powers:¹¹

"In making, altering, or annulling Rules of Court in pursuance of this Act, regard shall be had to the Rules of Court for the time being in force under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, so that the pleading, practice, and procedure in the High Court of Justice and Court of Appeal respectively constituted by this Act shall, so far as may be practicable and convenient, having regard to the difference of the laws and circumstances of the two countries, be the same as the pleading, practice, and procedure of the High Court and Court of Appeal respectively constituted by the said Acts."

For this reason many of the fundamental Rules of procedure were copied *verbatim* from the English R. S. C.¹²

¹⁰ The present Winding-up Rules (Order 74) were issued June 27, 1910, so they will not be found in the 1906 edition of the R. S. C. They are in 125 Rules and 63 Forms, practically identical with the English Rules.

¹¹ S. 61 of the Act of 1877.

¹² Nearly all Rules for the operation in Ireland of special statutes copy *verbatim* the corresponding English Rules. For instance, the Rules for the Patents and Designs Act, 1907 (English Order 53a, Rules 9-24, Irish Order 88a, May 17, 1910); for sec. 66 of the

There is also the requirement that Rules made must be laid before Parliament for forty days, during which time they are liable to be annulled, and the provisions of the Rules Publication Act, 1893, apply to these, as to all statutory rules in the United Kingdom.

Except for the direction above quoted there are no statutory regulations for the conduct of the Rule Committee's affairs, so that, like the English Committee, it meets not at fixed times but at the call of the Lord Chancellor as occasion demands and opportunity offers. It draws suggestions, in much the same way, from the various official bodies representing the profession, and from the lay public. In addition, the secretary to the Committee, who is also the Permanent Secretary to the Irish Lord Chancellor,¹³ is informally in communication with the secretary to the English Committee, who advises him whenever the latter Committee is considering or has passed amendments likely to be of interest to the Irish judges. Upon taking up the consideration of any proposed new Rules the Committee usually in the first instance refers the matter to a sub-committee of its own members to prepare the draft rules for submission to the general body; there is no permanent draftsman attached to the Committee, but Treasury sanction has on many occasions been obtained for the employment of a barrister to assist the Committee where the work of drafting was likely to be heavy or difficult. It may be noted that because of its smaller size the English Committee seldom refers matters to a sub-committee. It has been found in Ireland that the three practitioner members of the Committee take a very

National Insurance Act, 1911 (English Order 55b, Irish Order 54d, July 8, 1912); for sec. 33(4) of the Finance (1909-10) Act (English Rules of 1912, Irish Order 68, June 6, 1913).

¹³ For nearly thirty years this post has been held by J. Nugent Lentaigne, Esq.

active part in its work, and they are placed on all its sub-committees.

Attached to the Act of 1877 was a Schedule of Rules which went into effect together with it. It contained thirty-eight short Rules, drawn from the Rules in the English Schedule of 1875, and they were only intended to remove contradictions in the procedures of the Courts consolidated by the Act; they left nearly all the old procedure untouched. Numerous changes in succeeding years made necessary a consolidation and revision in 1891, which was carried out similarly to Lord Selborne's revision of the English Rules in 1883, and combined with the R. S. C. the bulk of the miscellaneous Rules in bankruptcy, probate, etc. Many Rules were also copied at that time from the English R. S. C. 1883. In 1905 the Irish R. S. C. were once more completely revised, so that they are now less free of anachronisms than the Rules in England. On both of those occasions the services of a barrister to assist the Committee in the drafting and in the manual work were obtained. Amendments to the R. S. C. 1905 are not frequent enough to make necessary the publication of an annual work like the English White Book; the last annotated edition of the Irish Acts and Rules was published in 1906.¹⁴

As in England, there is a system of local Courts in Ireland, the procedure in which is regulated by a small committee of judges. The Courts are called Civil Bill Courts and each is presided over by a Chairman. The County Officers and Courts (Ireland) Act, 1877, grants the power to make rules for the Civil Bill Courts to the Lord Chancellor and five of the chairmen "to be selected

¹⁴ The Judicature Acts and Rules, Ireland (Dublin, 1906), by Mr. J. O. (now the Rt. Hon. Mr. Justice) Wylie (then a barrister member of the Rule Committee). For Rules since 1905 see the Annual S. R. & O.

at a meeting of the chairmen convened for the purpose."¹⁵ This corresponds to the Committee of five County Court judges who have exercised similar powers in England since 1849, although the members of the English Committee are designated by the Lord Chancellor.

Isle of Man. — Another portion of the United Kingdom where, in spite of a Judicature Act of the modern type, picturesque old titles persist, is the Isle of Man. The House of Keys passed a Judicature Act in 1883, establishing a High Court in the island with combined powers in common law and equity, and bestowing the power to make and alter Rules of Court, to regulate procedure, upon "the Governor, with the advice and assistance of the other judges of the High Court, or of any two of them."¹⁶ These are four judges in the Manx High Court — the Governor, the Clerk of the Rolls, and two Deemsters.

Scotland. — To English common-lawyers Scotland is a land full of mystery and romance. The organization of its legal profession, of its courts and of their procedure, like its substantive law, differs from that of England in nearly every outward sign. Hidden behind a strangely sounding and quaint nomenclature there are doubtless many fundamental similarities, but they are safe from detection except by curious and patient research. Whatever the content of Scottish civil procedure may be, its development is regulated in a manner very similar to that made familiar by the English Judicature Acts, that is by the action of the judges. But the method as applied in Scotland far antedates the Judicature Acts; in fact, some Scottish writers claim for the Scottish Courts that the English legislators copied them in this respect.¹⁷

¹⁵ 40 & 41 Vict., c. 56, s. 79.

¹⁶ Isle of Man Judicature Act, 1883, s. 35. Gill's Statutes of the Isle of Man, vol. v, p. 222.

¹⁷ See Brodie-Innes: *Comparative Principles of the Laws of England and Scotland* (Edinburgh, 1903), p. 304.

For nearly four hundred years the Scottish judges have regulated the course of all proceedings before them under authority formally delegated to them by the Crown and confirmed by Parliament. In the statute of May 17, 1532, which created the Scottish Court of Session, a power was conferred upon the King to lay down rules of procedure for the conduct of causes, and this power the King magnanimously delegated to the Chancellor, President, and Lords of Session upon the occasion of the inauguration of the Court. Under this authority the judges made and issued rules styled "Acts of Sederunt."¹⁸ These were ratified by the Statute of 1540, c. 93 which also transferred completely to the judges the power to continue to make such Acts of Sederunt, "for the ordering of process and hasty expedition of justice." This power was freely exercised by them, sometimes being deliberately construed so as to enable the judges to make Rules which amounted to substantive law, as when in 1662 they "simplified the law by which the estate of a deceased debtor might be made available to his creditors."¹⁹ Even at the present day nearly all alterations in procedure are effected by Acts of Sederunt, and modern statutes which throw special duties on the courts, requiring Rules to be passed for proceedings under them, provide that in the case of Scotland the Rules should be made "by Act of Sederunt."²⁰ Published collections, called Books of Sederunt, are extant of all the Rules so issued

¹⁸ In Scotland the word *sederunt* is in frequent use. "A sitting of a deliberative or judicial body" (New English Dict.); "a more or less formal meeting or sitting of any association, society or company of men" (Century Dict.).

¹⁹ Act of Sederunt, February 28, 1662. See Green's *Encyclopaedia of Scots Law* (Edinburgh, 1909), vol. i., and Mackay: *Practice of the Court of Session* (Edinburgh, 1877), vol. i. p. 5.

²⁰ See sec. 11(b) of the Guardianship of Infants Act, 1886, 49 & 50 Vict., c. 27, and sec. 42(1) of the Finance (1909-10) Act, 1910, 10 Ed. VII, c. 8.

since 1532.²¹ There seems, however, to be no clear line of demarcation between the scope of Acts of Sederunt and of Acts of Parliament, as it is not unusual for changes to be made in details of Scottish civil procedure by Act of Parliament, even at the present time.

In the self-governing Dominions the delegation by the legislature to the Courts of the power to regulate procedure has been almost universal. With the exception of Quebec, Prince Edward Island, and New South Wales, every provincial and federal legislature has acknowledged the wisdom of leaving a technical subject like civil procedure to those who understand it.

Canada. — In Canada the Dominion and all but two of the Provinces have some form of Judicature Act in which the judges are empowered to regulate procedure. In Quebec there is a statutory Code of Civil Procedure²² in which the forms of proceeding correspond to those in the French Code and are wholly independent of the English R. S. C.²³; in Prince Edward Island the old courts of law and equity are still separate, and the modern English Rules could have no application.

In two of the Provinces the rule-making authority is reposed in a committee of which both judges and practitioners are members. These are the only instances (together with India) in which this characteristic of the English Rule Committee has been copied outside the United Kingdom. Newfoundland was the first to adopt

²¹ Acts of Sederunt from May, 1532, to January, 1553, published by L. P. Ilay Campbell, 1911; from January, 1553, to July, 1790, by William Tait, 1790; from July, 1790, to July, 1831, by the Faculty of Advocates, 1831; a complete abridgment from the beginning to 1886 is Alexander's Abridgment of Acts of Sederunt.

²² Code of Civil Procedure, 1897.

²³ The judges are empowered by the Code, ss. 73-5, to make minor Rules of Practice not incompatible with the Code. A collection of such Rules, 1850-92, has been published in a separate volume.

it, in 1899. There was then already a Judicature Act which had thrown all procedural matters into a Schedule of Rules subject to alteration by a majority of the judges.²⁴ In 1899 an amending Act added to the judges the following persons to assist in making Rules:²⁵

"The Chief Clerk and Registrar of the Supreme Court (being a barrister), and two other Benchers of the Law Society to be from time to time appointed for the purpose by the Chief Justice, in writing under his hand, such appointment to continue for such time as shall be specified therein."

The Act at present in force is the Judicature Act, 1904, which consolidated the two previous ones and made additions to the Schedule of Rules.²⁶

Ontario. — In Ontario, where a modified copy of the English Judicature Acts was passed as early as 1881, the Rule Committee device was not adopted until the revision of 1913. The first Ontario Act gave the judges the rule-making power, and was accompanied by a set of Orders and Rules based on the English R. S. C.; these were consolidated with the amendments and re-issued in 1888, upon the occasion of an amendment to the Act. In 1895 there was a new Judicature Act, under which a second revision of the Rules was published in 1897. Both these were repealed by the present Judicature Act of 1913²⁷ and the new Rules prepared under it. That Act sets up two authorities by which the Rules may be subjected to alteration. The first is the usual one, the judges of the Supreme Court, who

"may at any time amend or repeal any of the rules . . . and may make any further or additional rules for carrying this Act into

²⁴ Judicature Act, 1889, c. 50, of the Consolidated Statutes, ss. 146-51. A Schedule of fifty-five Orders, with Forms, based on the English R. S. C. 1883.

²⁵ Judicature Amendment Act, 1899, 62 & 63 Vict., c. xiii. s. 1.

²⁶ 4 Ed. VII, c. 3, ss. 272-6. A schedule of sixty-four Orders.

²⁷ 3 & 4 Geo. V, c. 19.

effect, and in particular . . . for regulating any matters relating to the practice and procedure of the Courts mentioned in clause (b), or to the duties of the officers thereof, or to the costs of proceedings therein, and any other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of this Act and of all other Acts respecting such Courts. . . . ”²⁸

It may be remarked that the “Courts mentioned in clause (b)” include not only “the Supreme Court and the Divisions thereof,” but also “the County and Surrogate Courts,” so that there is not a separate authority to make Rules for those local tribunals as there is in England. But in addition to the above there is this provision in the Act²⁹:

“(1) The Lieutenant-Governor in Council may from time to time authorize the Chief Justices, including the Chancellor, if any, *and any one or more* of the other Judges of the Supreme Court, and the Treasurer of the Law Society of Upper Canada, and any two barristers-at-law of Ontario, to make rules under this Act; and every appointment so made shall continue for the time specified in the Order-in-Council.

(2) The persons so appointed, or any three of them, may make such Rules. . . . ”

This special Rule Committee differs from the English Committee in three essential particulars: it is appointed by the Executive and not by a judicial officer; its size is not fixed, as the Executive may appoint “one or more of the other judges,” and may vary the number “from time to time”; the powers reposed in the Committee may be exercised by “any three” of its members. Conceivably, then, the three practitioner members of such a Committee could pass Rules to which all the judges might object. In England, of the twelve members in the

²⁸ S. 111 (1) (g).

²⁹ S. 112.

Committee, eight are judges and four practitioners; to pass a Rule requires the assent of at least five members, of whom the Lord Chancellor must be one.³⁰ No examples of Rules passed under the Ontario invention have as yet come to hand.

In addition to the County Courts there is a system of local inferior courts in Ontario called Division Courts, with jurisdiction in ordinary cases up to \$60. Procedure in these is regulated largely by the Division Courts Act, but a considerable body of rules (106 Rules and 91 Forms) has been adopted by the Board of County Judges (5 in number) set up under sec. 224 of the Act (R. S. 1914, c. 63; 10 Edw. VII, c. 32).

Manitoba. — No less original a departure from the English rule-making system is presented in the practice of three Canadian Provinces whose legislatures, although they have expressly delegated to the judges the power to make Rules governing all the procedure in their courts, continue to pass Acts making alterations in the rules of practice. One Province that presents this curious anomaly is Manitoba. The consolidated King's Bench Act of 1902³¹ bestows upon a majority of the judges of the court "present at any meeting held for that purpose"³² the power to alter or annul any Rules in force, and to make any additional Rules necessary. The Act carries with it a schedule of 993 Rules and 155 Forms, largely drawn from the English R. S. C. and the Ontario Rules of 1897. But in the very same year the provincial legislature, in spite of its delegation of authority, passed an Act amending certain Rules in the schedule³³; and since then alterations have been made by the legislature at

³⁰ S. 19 of the Judicature Act, 1881.

³¹ C. 40 of the Revised Statutes, 1902, consolidating the Acts of 1895 (58 & 59 Vict., c. 6), and 1900 (1 Ed. VII, c. 6).

³² S. 63.

³³ Act 6 of 1902.

every succeeding session except that of 1907.³⁴ The legislature has altered or added over 175 Rules, and no amendments appear to have been issued by the Supreme Court at all.³⁵ This would seem to defeat all the objects for which it was deemed necessary to give the judges complete power over procedure — to prevent meddling by non-professional authorities, and to relieve the legislature of the burden of technical details.

Nova Scotia and New Brunswick. — Nova Scotia and New Brunswick are the other two Provinces where the judges both do and do not regulate procedure. In the former there is a Judicature Act, 1900,³⁶ with a schedule of seventy Orders, based, like Manitoba's, on the English and Ontario Rules. The judges are empowered by the Act³⁷ to make rules of practice altering the Rules in the schedule, and from 1900 to 1911 they issued twelve such amendments. But that did not prevent the legislature from expressing its own opinion about several of the Rules, for it has passed three Acts³⁸ introducing alterations of its own. In New Brunswick the legislature seems particularly fickle, as it allowed only three years to intervene between the last two complete revisions of its Judicature Act, and even since the latest (that of 1909) an Act has been passed altering the Rules in the schedule. The present Act,³⁹ replacing

³⁴ Acts 11 of 1903, 8 of 1904, 6 of 1905, 17 of 1906, 11 to 14 of 1908, 13 and 14 of 1909, 17 of 1910, 12 to 14 of 1911, 14 and 15 of 1912, and 12 of 1913.

³⁵ In 1911 a volume was published in Winnipeg containing the Act as amended up to that date.

³⁶ Revised Statutes, 1900, c. 155, replacing the Act of 1884, 47 Vict., c. 25, and Schedule of Rules, which appeared in the old Revised Statutes as c. 104.

³⁷ S. 45.

³⁸ Acts 15 and 16 of 1901, and 17 of 1904.

³⁹ 9 Ed. VII, c. 5.

the Act of 1906,⁴⁰ gives the judges the power to make Rules for all purposes,⁴¹ and carries with it a schedule of seventy-two Orders which closely follow the English R. S. C. and to a lesser extent the Ontario Rules. In 1913 six of the Rules in the schedule were altered by statute.⁴² Another remarkable point in New Brunswick is that under the present Act Rules of Court may alter not only the Schedule of Rules but the provisions in the body of the Act itself. This carries the rule-making power very far, as the Act is of the usual type defining the organization of the Court, its jurisdiction, its divisions, and the duties of its officers. However, the judges do not appear so far to have issued any amendments under the section, either to the schedule or to the Act itself.

Alberta. — In Alberta too the legislature has continued to enact amendments to a Schedule of Rules, although it apparently delegated that power away from itself. The Province was formerly part of the Northwest Territories, for which there was a Judicature Ordinance with a schedule of 47 Orders containing Rules and Forms.⁴³ The Ordinance empowered the judges to regulate procedure by altering or adding to the Rules in the schedule.⁴⁴ When the Provinces of Alberta and Saskatchewan were carved out of the larger area each passed a Judicature Act setting up a Supreme Court of its own and adopting *in toto* the Rules in force under the older Ordinance. The Alberta Act then provided that, as to amendments after 1907:⁴⁵

“The Lieutenant-Governor in Council may from time to time make and authorize the promulgation of Rules of Court . . . and

⁴⁰ 6 Ed. VII, c. 35.

⁴¹ S. 50 (1).

⁴² Act 23 of 1913.

⁴³ Consolidated Ordinances, 1898, c. 21. Repeated, with all amendments, in the Consolidated Ordinances, 1907.

⁴⁴ Ss. 20-22.

⁴⁵ Supreme Court Act, c. 3 of 1907, s. 24.

may alter and annul any Rules of Court or tariff of costs or fees for the time being in force . . . and may make any further or additional Rules for carrying this Act into effect, or may authorize the judges of the Court to make and promulgate such Rules. . . "

So that the delegation of rule-making power to the judges is not direct, but discretionary with the Lieutenant-Governor in Council. However, the Act expressly allows the latter authority complete control over rule-making, so it is rather a surprise to find that on three occasions since 1907 Acts have been passed by the legislature to amend parts of the Schedule of Rules.⁴⁶ There have also been some amendments made by Orders-in-Council. The Saskatchewan Act⁴⁷ differs from the Alberta statute in expressly empowering the judges to make alterations in and additions to the Schedule of Rules⁴⁸; but it also gives the Lieutenant-Governor in Council a concurrent power to do so.⁴⁹ In 1911 a revised set of Rules for Saskatchewan was issued by the latter authority, in fifty-four Orders based on the English and Ontario Rules.⁵⁰

British Columbia. — In British Columbia the judges are not mentioned in the rule-making section of the Act at all. The power is ostensibly given solely to the Lieutenant-Governor in Council.⁵¹ It is in fact exercised by him, however, only upon the recommendation of the judges.⁵² A set of Rules was published under the present Act in 1906, in seventy-two Orders with Forms.⁵³ In

⁴⁶ Acts 5 of 1907, 4 of 1909, and 4 of 1911-12.

⁴⁷ Judicature Act, 1907, c. 8 (Revised Statutes, 1909, c. 52).

⁴⁸ S. 55 (2).

⁴⁹ S. 55 (5).

⁵⁰ The Rules are published in a separate volume.

⁵¹ Supreme Courts Act, 1903-4, 3 & 4 Ed. VII, c. 15 (Revised Statutes, 1911, c. 58). This replaces the previous Act and Rules of 1890 (Revised Statutes, 1897, c. 56).

⁵² Amendments have been made by Orders-in-Council in 1906, 1908, and 1910.

⁵³ Published, Vancouver, in a separate volume.

the Yukon Territory the Judicature Ordinance ⁵⁴ authorizes the judges of the Territorial Court to alter or add to the Rules in its schedule — 629 Rules grouped into forty-seven Orders with Forms, based on the English R. S. C.

The Supreme Court of the Dominion of Canada, first established in 1875,⁵⁵ is purely an appellate tribunal, and it has the power to prescribe rules for all proceedings brought before it.⁵⁶

Australia. — In Australia the statutes creating the High Court of the federation are of interest because they introduce one important element of the English rule-making system not copied in other parts of the Empire — the publication of draft Rules in advance of their final promulgation. The Commonwealth is the only jurisdiction outside the United Kingdom which has passed a Rules Publication Act; the Australian Act ⁵⁷ requires publication of all statutory Rules in draft sixty days before they are made — an increase of twenty days over the period required by the English Act, because of the greater distances for the transmission of criticisms. Another improvement in the Commonwealth Acts creating the High Court is that the usual Judicature Act is split into two parts independent of each other. One is called the Judiciary Act ⁵⁸ and deals solely with the organization of the Court, the duties of its members and officers, the sittings, the distribution of business, the

⁵⁴ Consolidated Ordinances, 1902, c. 17, s. 14.

⁵⁵ The first statute was reenacted in the Revised Statutes, 1886, as c. 135; amended in 1891 and 1906; consolidated as Revised Statutes, 1906, c. 139 — the present Act.

⁵⁶ S. 109 of the present Act. In 1907, 143 Rules were issued by the Court to regulate appeals.

⁵⁷ Rules Publication Act, no. 18 of 1903, s. 3 (1).

⁵⁸ Judiciary Act, 1903–10 (as amended). See Acts of the Commonwealth, 1901–11 (Melbourne, 1913). The title is copied from that of the United States Federal Act.

qualifications of practitioners, and costs and fees; the other is named the High Court Procedure Act⁵⁹ and is confined to matters of procedure, fixing certain definite principles in the body of the Act, and throwing all the procedural details into a schedule of fifty-seven Orders.⁶⁰ Both Acts expressly delegate to the judges the power to make Rules of Court for all purposes connected with their operation, and for altering or adding to the schedule of procedural Rules.⁶¹ Numerous Rules have been issued under both Acts, which are published in separate volumes of Statutory Rules and Orders.⁶² The English method of delegating away from Parliament the power to settle innumerable small details of legislation, to be issued in the form of Statutory Rules, is followed in the Commonwealth Parliament, and, as in England, the Courts are constituted the rule-making authority in all statutes in which they are called upon to fulfill duties under the Act. One example is the Service and Execution of Process Acts,⁶³ which make it possible to serve the legal process of any State in the federation in any other State, under Rules to be prescribed for that purpose by the Supreme Court in each State.⁶⁴

With the exception of New South Wales and Tasmania all the constituent states of the Commonwealth have passed some form of modern Judicature Act. In New

⁵⁹ High Court Procedure Act, 1903.

⁶⁰ Part I., Original Jurisdiction, 57 Orders; Part II., Appellate Jurisdiction, 5 Orders. Numerous amendments made from 1903 to 1912 are incorporated in the schedule as printed in the Act in the 1913 Acts of the Commonwealth.

⁶¹ Judiciary Act, s. 86; Procedure Act, s. 33.

⁶² The Rules under the Judiciary Act are Statutory Rules nos. 50 of 1904, 125 of 1907, 35 of 1908, 130 of 1910, and 330 of 1913. Rules under the Procedure Act are incorporated in the reprinted schedule.

⁶³ Service and Execution of Process Acts, 1901-12, Sessional Acts, vol. xi, 1912.

⁶⁴ S. 27 (1).

South Wales practically all the Rules of civil procedure are in statutory form, the rule-making power of the judges being limited to such matters as it extended to in England under the Common Law Procedure Acts. In fact as recently as 1899 New South Wales passed a Common Law Procedure Act⁶⁵ which repeated a large number of sections from the English Acts of 1852, 1854, and 1860. In it the judges are authorized to make Rules of Court not inconsistent with the Act.⁶⁶ Law and equity are still administered separately in New South Wales. Tasmania passed a Supreme Court Act in 1856,⁶⁷ under the influence of the first Common Law Procedure Acts and has not since then altered the constitution of the Court. Law and equity are still separate in Tasmania, the procedure on each side being regulated by Rules and Orders made under the authority of the Act of 1856.⁶⁸

The other four states have Judicature Acts, with Schedules of Rules which are subject to alteration by the judges, modeled after the English Act of 1875. The Queensland Act was passed in 1876.⁶⁹ The Schedule of Rules was revised and reissued in 1900,⁷⁰ and opens with this interesting counterpart of the later English summons for directions:

"When a party desires to take a step in a cause or matter, and the manner or form of procedure is not prescribed by these Rules or by

⁶⁵ No. 21 of 1899.

⁶⁶ Ss. 268-70.

⁶⁷ 19 Vict., no. 23.

⁶⁸ S. 6. Under this the Common Law Rules were published April 28, 1856, based on the English *Regulae Generales*, and the Equity Rules, April 7, 1864, based on the Consolidated Orders of the Court of Chancery. The judges have also issued voluminous Rules under the Small Debts Act, 1867, and the Bankruptcy Act, 1870, and Rules for the conduct of matrimonial causes, in 1878.

⁶⁹ 40 Vict., no. 6; rule-making power in s. 17.

⁷⁰ Appendix III to Acts of 1900; ninety-four Orders, with Forms.

the practice of the Court, the party may apply to a judge for directions, and any step taken in accordance with the directions given by the judge shall be deemed to be regular and sufficient.”⁷¹

The South Australia Act was passed in 1878,⁷² and under it General Rules were published March 1, 1879, in fifty-nine Orders drawn from the English Schedule of 1875. Additional Orders, up to the seventy-ninth, were added in 1884 and 1893, partly inspired by amendments to the English R. S. C. Western Australia passed its Supreme Court Act in 1880,⁷³ under which the judges later issued seventy-two Orders based on the English Rules. Victoria's first Judicature Act was passed in 1883,⁷⁴ and a code of Rules framed thereunder was issued by the judges in the following year. The present Act is of 1890,⁷⁵ and a new set of Rules has been issued under it repealing the older one.

New Zealand's Judicature Act⁷⁶ treats in Part I of the Supreme Court, with original jurisdiction, and in Part II of the Court of Appeal, the appellate tribunal, although the same judges sit in both Courts. So also there are two Schedules of Rules, one for original, the other for appellate proceedings.⁷⁷

South Africa. — In South Africa the power of the judges to regulate pleading and procedure, as well as the

⁷¹ This is signed by Sir Samuel Walker Griffith, now Chief Justice of the Commonwealth.

⁷² Supreme Court Act, no. 116 of 1878; rule-making power in s. 29.

⁷³ 44 Vict., no. 10; rule-making power in s. 24.

⁷⁴ 47 Vict., no. 761.

⁷⁵ Supreme Court Act, 1890, 54 Vict., no. 1142; rule-making power in s. 23.

⁷⁶ No. 89 of 1908. Rules for the Supreme Court are made by the judges under s. 51, and for the Court of Appeal under s. 71. This Act and the Rules supplant the prior Act and Rules of 1882.

⁷⁷ 607 Rules, with Forms, for the Supreme Court; forty-nine Rules for the Court of Appeal; largely influenced by the English Rules.

details of practice, is old and well established. In the 1834 Charter of Justice for the Cape Colony appears this comprehension section, which has been copied almost *verbatim* in the High Court Acts of the several provinces:⁷⁸

"It shall be lawful for the members of the High Court, or the majority of them, to frame, constitute, and establish such Rules, Orders, and Regulations as to them shall seem meet, touching and concerning the time and place of holding the said Court and the District Courts; the form and manner of proceeding to be observed in the said Courts respectively; the practice and pleading upon all actions, suits, and other matters of a civil nature to be therein brought; the appointing of commissioners to take bail and examine witnesses; the examination of witnesses *de bene esse* and allowing the same as evidence; the proceedings of the sheriff and other ministerial officers of the said Courts respectively; the process of the said Courts and the mode of executing the same; the summoning of witnesses; the procedure with regard to the admission of advocates, attorneys, conveyancers, and notaries public, and other officers of the said Courts; the suspension from the right to practise, or the cancellation of admission to practise in the said Courts of advocates, attorneys, notaries public, and conveyancers; the fees to be lawfully demanded by and payable to any officers or attorneys in the said Courts respectively; the manner of recording and noting evidence of the proceedings in the said Courts; and touching and concerning all such other matters and things necessary for the proper conduct and dispatch of business in the said Courts.

Provided always that no such Rules, Orders, and Regulations shall be repugnant to the provisions of this Charter, and that the same shall be so framed as to promote, as far as may be, economy and expedition in the dispatch of the business of the afore-mentioned Courts respectively, and that all such Rules and Forms of practice, process, and proceedings shall, so far as the circumstances of the said Colony shall permit, be framed with reference to the corresponding Rules and Forms in use in our Courts of Record at Westminster, and that the same be drawn up in plain, succinct, and compendious terms, avoiding all unnecessary repetitions and obscurity, and promulgated in the most public and authentic manner in the said Colony, for three months at least before the same shall operate and take effect."

⁷⁸ S. 46.

This wide power enabled the judges to mold procedure before them so as most easily to combine the Roman-Dutch law which is the basis of jurisprudence at the Cape with the English common law superimposed upon it. When the judicature of the Cape Colony was remodeled in 1896 the old rule-making section was incorporated into the new Act by reference.⁷⁹ In the same year the Supreme and Circuit Courts of Natal were consolidated in a Judicature Act which contains a section repeating practically the whole of the rule-making section of the Charter of 1834.⁸⁰ Two years later an Order in Council creating a High Court for Southern Rhodesia vested in it a similar rule-making power, somewhat more briefly expressed.⁸¹ In 1902 an Ordinance in the Orange River Colony⁸² and a Proclamation in the Transvaal,⁸³ establishing High Courts in the two Colonies, bestowed upon them wide rule-making powers in the identical terms of the old Cape Charter, omitting only the concluding clause which refers to the Courts at Westminster.⁸⁴

When the Union was created in 1909⁸⁵ the Supreme Courts of the several colonies were made Divisions

⁷⁹ Cape of Good Hope Colony Better Administration of Justice Act, no. 35 of 1896, s. 56. Over 400 Rules have been issued, from time to time.

⁸⁰ Act no. 39 of 1896, s. 69. In 1907 there were issued forty-four Orders, with Forms, drawn partly from the English Rules.

⁸¹ Order in Council, October 20, 1898, Part IV, s. 57.

⁸² Orange River Ordinance, no. 4 of 1902, ss. 43-4. In the Government Gazette for July 23, 1902, were published 156 Rules.

⁸³ Transvaal Proclamation, no. 14 of 1902, ss. 31-2. Also s. 10 of Ordinance No. 10 of 1903, regulating assizes.

⁸⁴ Rules in the Transvaal have been published in Government Notices, nos. 153 and 204 of 1902; 501, 1093, and 1376 of 1903; 678 of 1905; 882 and 1266 of 1906; 640 and 698 of 1908 — about 160 Rules in all.

⁸⁵ South Africa Act, 1909, 9 Ed. VII, c. 9.

of the Supreme Court of South Africa, and a power was vested in "the Chief Justice of South Africa and the ordinary judges of appeal"⁸⁶ to make rules for the conduct of all proceedings in the Appellate Division of the consolidated Court. The Chief Justice was also empowered to join with the other judges of the Supreme Court in making Rules for the several provincial and local divisions.⁸⁷

India.— Apart from the self-governing dominions, India is the largest unit for which the English rule-making system has been directly copied. The judicial establishments of the Indian Empire, though most varied, may be said to centre in six High Courts, four of them set up by Imperial charter under the Indian High Courts Act, 1861,⁸⁸ and two by subsequent action under local governmental powers.⁸⁹ The first four are situate at Calcutta, Madras, Bombay, and Allahabad; the last two at Lahore and Rangoon. For many years civil proceedings in these Courts, and in all the inferior Courts within their appellate jurisdiction, were regulated by an Indian Code of Civil Procedure, one of the notable series of code statutes which made Indian legislation the joy of law reformers.⁹⁰ There was, however, in spite of the Code, whose clauses were not subject to alteration except by statute, a power given to the judges by s. 15 of the High Courts Act to make al

⁸⁶ S. 107. For Rules under this section see Government Notices, nos. 61, 326, and 561 of 1910.

⁸⁷ S. 108. For Rules under this section see Government Notice no. 447 of 1911.

⁸⁸ 24 & 25 Vict., c. 104.

⁸⁹ Since the above was written another High Court was set up in 1915 by Imperial Charter, at Patna, in the newly erected province of Behar and Orissa.

⁹⁰ The first Code was Act VIII of 1859; that was supplanted by Act X of 1887, and that in turn by Act XIV of 1882.

such rules and regulations as were necessary to supplement the Code. This was to enable them to accommodate the fixed Code to the widely varying local conditions in which it had to be administered, and the power was freely used.

In 1908 the character of the Civil Procedure Code was completely altered.⁹¹ A conviction that statutory regulation of civil procedure is too rigid, and that the time had come to extend to Indian Courts the greater autonomy gradually being bestowed on the other departments of government, contributed to causing a great change in its form. The new Code is, like the English Judicature Acts, very little more than a code of court organization, to which is appended a long Schedule of Rules and Forms which embody the substance of the procedural regulations,⁹² and each High Court is empowered to make Rules of Court altering the Rules in the Schedule, after taking into consideration the advice of a Rule Committee created by the Act.

The operation of the rule-making system is so carefully worked out that the sections on the subject are worth quoting:

"S. 122: High Courts . . . may, from time to time after previous publication, make Rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such Rules alter, annul, or add to all or any of the Rules in the First Schedule."

All the inferior Courts from which appeals lie to each High Court are the "Courts subject to their superintendence." The High Court is charged in the Act with the duty to

⁹¹ Act V of 1908.

⁹² An authoritative annotated edition of the Act and Rules is Woodroffe and Ameer Ali: *Code of Civil Procedure* (Calcutta, 1908). A more recent one is D. F. Mulla: *Code of Civil Procedure* (Bombay, 1913). The Schedule of Rules contains fifty Orders. There is a separate Schedule of Rules for Arbitrations.

exercise a general supervision over their conduct and administration:

"S. 123: (1) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore, and Rangoon.

(2) Each such Committee shall consist of the following persons, namely:

(a) Three judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years;

(b) a barrister practising in that Court;

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court;

(d) a Judge of a Civil Court subordinate to the High Court; and

(e) in the towns of Calcutta, Madras, and Bombay, an attorney.⁹³

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president.

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other judges to be appointed shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.⁹⁴

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies, or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge, and shall receive such remuneration as shall be provided in this behalf by the Governor-General in Council, or by the local Government, as the case may be."

⁹³ The judges in the lower Courts are called District Judges. Vakil and pleader are synonymous terms; see an article by C. E. A. Bedwell, Esq., in 13 *Journal of the Society of Comparative Legislation*, 130 (1914), for the qualifications required of them.

⁹⁴ None of the Chief Justices or Chief Judges has, so far, chosen to appoint himself to the Rule Committee.

Each Rule Committee, therefore, of six or seven members and a secretary, represents the collective experience of both judges and practitioners. Of the four judges in each Committee at least two must have sat in the lower Courts, which is important, as the High Court can make rules for them. The officer who acts as secretary to a Rule Committee is usually the Registrar of the High Court; no extra salary has yet been attached to the appointment. This arrangement seems to remedy the defect claimed to exist in the English Rule Committee's organization, by reason of the fact that no Master of the Supreme Court has a voice in its councils.

"S. 124: Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter, or add to the Rules in the First Schedule or to make new Rules, and before making any Rules under s. 122 the High Court shall take such report into consideration."

Unlike the English body, the Indian Rule Committees are not themselves the authority to whom the quasi-legislative rule-making function has been delegated by the legislature. They act merely in an advisory capacity; they can recommend to their respective High Courts the adoption of an amendment, or they can advise against it; but their conclusions are not binding upon the High Courts. To a certain extent the views of a Committee would coincide with those of its Court, as the opinions of the four judicial members would outweigh those of the practitioner members in the Committee; but the judges might themselves be a minority in the High Court, there being nineteen judges in Calcutta, twelve in Madras, seven in Bombay, and seven in Allahabad.

But the High Courts are not entirely unfettered in the power to make rules, for by

"S. 126: Rules made under the foregoing provisions shall be subject to the previous sanction of the following authorities, namely:

(a) If the rule is made by a High Court established under the Indian High Courts Act, 1861, to the sanction of the authority prescribed by s. 15 of that Act for rules made under that section;

(b) if the rule is made by any other High Court, to the sanction of the local Government."

This amounts to a requirement that each High Court must have the approval of the Governor in Council of the Province in which it is situate, for Rules made. This approval is not by any means a purely formal matter, and is not forthcoming unless the Executive is satisfied the High Court is not going too far.

"S. 127: Rules so made and sanctioned shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the High Court which made them, as if they had been contained in the First Schedule."

This is merely a condition subsequent. By a short phrase in s. 122 the Act seems to require also a prior publication, similar to that called for by the English Rules Publication Act, 1893. The section says that a High Court may make Rules "from time to time *after previous publication*." No explicit directions are given elsewhere for the manner or time of such "previous publication," but the obvious intention of the words is that due notice should be given of the intention to issue Rules, by publishing their draft form before they are finally signed.

The machinery set up by ss. 122-7 is perhaps, because of its novelty to the Indian judges, only just beginning to be used. Only a few alterations in the Schedule of Rules have so far been effected.⁹⁵ Not all the High Courts have availed themselves of it, and up to the present the Calcutta High Court has not yet even appointed its Rule Committee under the Act. There is still in force a very considerable body of Rules in all the High Courts,

⁹⁵ The amendments made up to 1913 are collected in an Appendix to Mulla, pp. 988-1022.

made under s. 15 of the Act of 1861 and expressly ratified by the 1908 Code:

"S. 129: Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, may make such Rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such Rules in force at the commencement of this Code."

These Rules are collected and published from time to time by the High Courts from which they issue, and provide regulations for the numerous details of local application left untouched by both the old statutory Code of Civil Procedure and the present Schedule of Rules. The Calcutta Rules appear in three volumes, containing the regulations for the Original Side,⁹⁶ the Appellate Side,⁹⁷ and Inferior Courts,⁹⁸ respectively. The Bombay Rules are in two volumes: General Rules, and Rules for the Appellate Side.⁹⁹ The Madras Rules are in two volumes: Original Side,¹⁰⁰ and Appellate Side¹⁰¹. The Allahabad Rules are in one volume of General Rules.¹⁰²

The Far East. — British Colonial courts all over the Far East, working under conditions similar to those prevailing in India, are in the habit of looking to the Indian courts for suggestions for possible improvements. In fact, in a few of the Colonies the entire Indian Code of Civil Procedure is by reference incorporated into the local law. Changes in Indian procedure are therefore observed with interest in all these places, and often reflected in their courts.

⁹⁶ Collected by J. H. Hechle, and published Calcutta, 1914.

⁹⁷ Watson's Collection, Calcutta, 1910.

⁹⁸ Calcutta, 1910.

⁹⁹ Bombay, Government Central Press, 1909.

¹⁰⁰ Madras, Scottish Press, 1887.

¹⁰¹ Madras, Scottish Press, 1905.

¹⁰² Allahabad, United Provinces Government Press, 1911.

Ceylon is an example. The largest of the Crown Colonies, its judgeships are the highest appointments in the colonial judicial service. Although its substantive law is Roman-Dutch, like that of South Africa, its civil procedure was, until this year, expressed in a statutory unchangeable code based partly on the Indian Code of 1882 and partly on the New York Code.¹⁰³ The local legislators, however, being now satisfied that procedure should be left to the judges, a new code has been drafted in the form of the new Indian Code of 1908 and is about to pass.¹⁰⁴ It makes the entire code subject to a power of amendment and revision conferred upon a Rule Committee consisting of the Chief Justice or a judge nominated by him, the Attorney-General or the Solicitor-General or a Crown Counsel, a District Judge, a practising Advocate and a practising Proctor (five in all).

After Ceylon, Hongkong has the busiest of the Far Eastern courts. There too the influence of the Indian Codes is marked, although the actual rule-making authority has not been conferred upon the judges. The present Code of Civil Procedure is a statute in thirty chapters, containing 709 sections and fifty Forms.¹⁰⁵ It was drafted by the Chief Justice, Sir John W. Carrington, who, in the preface to his edition of the Code,¹⁰⁶ explains that some use was made of the 1882 Indian Code of Civil Procedure, and that a great quantity of new matter was taken from the English R. S. C. The rest was drawn from the older Hongkong Code of 1873.

¹⁰³ Ordinance no. 2 of 1889. It is a statute in sixty-seven chapters, containing 838 sections.

¹⁰⁴ December, 1914. The 1889 Code is therefore omitted from the 1913 Revised Statutes of Ceylon. The explanatory memorandum published with the draft of the Code states that: "Free use has been made of the new Indian Code and of the Rules of the Supreme Court of Judicature in England.

¹⁰⁵ Ordinance no. 3 of 1901.

¹⁰⁶ Hongkong, 1901.

That was a statute in twenty chapters drafted by Mr. Julian (later Lord) Pauncefoot, then the Attorney-General for Hongkong, which was based partly on the Indian Code of 1859, partly on the Rules of the High Court of Bengal at Calcutta, and partly on the Report of the English Judicature Commission of 1869. It has the distinction of having combined the procedure in law and equity in a British possession two years before the English Judicature Act itself went into effect.

Straits Settlements has also a statutory Code which copies many sections of the Indian Code and of the English R.S.C.¹⁰⁷; but in other parts of the Malay Peninsula the procedure is regulated by Rules of Court issued by the local Judicial Commissioners.¹⁰⁸ The Chief Justice of the Straits Settlements has recently been empowered to prescribe Rules of Court for proceedings in Labuan.¹⁰⁹

East Africa.—In Zanzibar the Court has, since 1908,¹¹⁰ had the power to prescribe all Rules for proceedings, and under this power 200 Rules drawn from the current English R.S.C. and from the new Indian Rules were issued by the judge in 1911. In East Africa¹¹¹ and in Uganda¹¹² the Indian Code is, by local Ordinances, adopted in its entirety. An Order in Council extends the Indian Civil Procedure Code also to Somaliland¹¹³ and allows the Protectorate Court to supplement it by

¹⁰⁷ Straits Settlements Ordinance 31 of 1907, a statute in sixty-one chapters, containing 1,343 sections.

¹⁰⁸ Selangor, Perak, and Penang: Enactment 15 of 1905, s. 67. Rules are made by the Judicial Commissioners, or any two of them, of whom the Chief Judicial Commissioner must be one.

¹⁰⁹ Straits Settlements Ordinance 3 of 1911, s. 47.

¹¹⁰ The Courts Decree, no. 8 of 1908, s. 40.

¹¹¹ Ordinance no. 13 of 1907.

¹¹² The Courts Ordinance, no. 12 of 1911, s. 2.

¹¹³ Somaliland Order in Council 1899, s. 23.

Rules necessary for local purposes.¹¹⁴ The British Central Africa Order, however,¹¹⁵ makes the English procedure the model for the Court and gives the High Court complete power to regulate procedure. The High Court Act for the Nyasaland Protectorate¹¹⁶ is a combination of statutory and non-statutory regulation of procedure; it contains a little over 200 sections of procedural matter and enacts that as to any gaps left they are to be filled by applying the English R. S. C. as amended from time to time.¹¹⁷

Mauritius is a colony in which, in spite of the influence of a foreign procedural system, the English Rules have been very largely copied. There a French Code of Civil Procedure was in force until 1903, when the judges, under general powers conferred upon them in the Courts Ordinance,¹¹⁸ issued an entirely new set of 199 Rules, based on the English R. S. C.¹¹⁹

The Pacific. — Procedure in the Colonies in the Pacific is wholly subject to Rules of Court. In British New Guinea (Papua) the practice and procedure of the Courts of Queensland were adopted *in toto* by the Ordinance of 1888,¹²⁰ which also gave the Chief Magistrate the power to alter and make new Rules of Court. Under this power he issued a set of 132 "Rules of Civil Procedure" in the following year. His rule-making power extends also to criminal procedure. In Fiji the Supreme Court Act of 1875¹²¹ followed closely upon the English Judicature Act, and under the rule-making power it

¹¹⁴ S. 31.

¹¹⁵ British Central Africa Order in Council 1902, s. 22.

¹¹⁶ High Court Practice and Procedure Act, No. 3 of 1906.

¹¹⁷ S. 2.

¹¹⁸ And the Royal Order in Council of February 23, 1836.

¹¹⁹ See Piggott's Laws, Rev. 1905, vol. vi. Foreign procedural codes are still in force in Seychelles (French) and in Malta (Italian).

¹²⁰ S. 9.

¹²¹ No. 7 of 1875.

granted to the Chief Justice¹²² a full set of Rules was issued in 1894. The Pacific Islands, under the Pacific High Commissioner, are provided with a judicial system in the Order in Council of 1893¹²³ which gives the High Commissioner the power to make Rules of Court.¹²⁴ A schedule of 82 Rules and 33 Forms is appended to the Order. The Brunei Order in Council¹²⁵ gives the Court the power to prescribe all Rules for proceedings. At Wei-hai-wei, likewise, there is a Court set up by Order in Council¹²⁶ which has the power to make all necessary Rules, and from which appeals lie to the Court at Hong-kong, subject to Rules made by the latter.

Mediterranean. — Ottoman law is the basis of the procedure in a number of protectorates and other areas where British officers are empowered to exercise foreign jurisdiction. The Orders in Council providing courts for such territory are grouped under the heading "Foreign Jurisdiction" in the collected Statutory Rules and Orders, and they uniformly appoint the rule-making power to the local judicial officer. The most prominent of these is Cyprus, now recently raised in law as well as in fact to the state of a British possession.¹²⁷

At the other end of the Mediterranean, in Gibraltar, under the Order in Council of 1888,¹²⁸ the Court is

¹²² S. 27. The 1894 Rules supplant the earlier Rules of 1875, which were largely copied from the English Schedule, but arranged similarly to the Leeward Islands Civil Procedure Code. In 1890 a set of 231 Bankruptcy Rules, with 69 Forms, was published.

¹²³ S. R. O. 1903, v. 484.

¹²⁴ Ss. 101-7.

¹²⁵ Brunei Order in Council, 1901, s. 91.

¹²⁶ Wei-hai-wei Order in Council, 1901, s. 79.

¹²⁷ Cyprus Order in Council, 1882, s. 209. Under this were issued the Rules of 1886, in 31 Orders. They are not based on the English Rules. Frequent amendments are made by the High Commissioner and the Chief Justice.

¹²⁸ Laws, 1913, vol. i.

organized on the modern judicature principle, the chief Justice having the power to make all Rules. There is an interesting direction to him to guide the exercise of his rule-making authority:¹²⁹

"All Rules shall be framed to promote, so far as may be, economy and expedition in the dispatch of the business of the Supreme Court; and all such Rules and Forms of practice, process, and proceeding shall, so far as the circumstances of Gibraltar may permit, be framed with reference to the corresponding Rules and Forms in use in the High Court of Justice in England."

West Africa.—In the Colonies down the West African Coast very similar arrangements prevail. In the Gambia the Chief Magistrate may at any time make Rules of Court for all purposes,¹³⁰ and in 1911 a set of 65 Orders drawn from the English R. S. C. was issued. In Sierra Leone it is the Chief Justice who has the power,¹³¹ and in 1908 a set of 65 Orders was issued thereunder. In the Gold Coast the Chief Justice, with the concurrence of any one of the four *puisne* judges, may make Rules,¹³² and to the Ordinance creating the Supreme Court is appended a Schedule of Rules and Forms, divided into 53 Orders on the English plan. Similar Ordinances, with Schedules of Rules, and allowing the Chief Justice to make or alter Rules, were passed in Southern Nigeria in 1900,¹³³ and in Northern Nigeria in 1902.¹³⁴

¹²⁹ S. 23. Under this were issued in 1889 three series of Rules: 544 General and Probate Rules (copied from the English R. S. C.), 111 Rules for Divorce Causes, and 254 Rules for Summary Jurisdiction (based on the English County Court Rules, 1886).

¹³⁰ Ordinance 3 of 1908, s. 2.

¹³¹ Ordinance 14 of 1904, s. 21.

¹³² Ordinance 4 of 1876, s. 81.

¹³³ Ordinance 6 of 1900, s. 119, as amended by Ordinance 28 of 1912. A Schedule of 61 Orders and 125 Forms.

¹³⁴ Proclamation 6 of 1902, s. 58. A Schedule of 57 Orders and 33 Forms.

West Indies. — Across the Atlantic the West Indies have paid the Judicature Acts the compliment of widespread adoption. In two cases the form taken by the local Ordinances is of especial interest — it is that of a code statutory in character but liable to alteration by Rule of Court. In one of these cases the liability to such alteration was introduced many years after the Code itself. In Grenada the Civil Procedure Code of 1882¹³⁵ is in 9 Parts, containing 419 Rules and 53 Forms, based on the English Schedule of 1875; the concluding section¹³⁶ authorizes the Chief Justice to make Rules for regulating the Court's Procedure, which Rules "may alter or repeal any of the provisions of this Ordinance." This differs from the English form of Judicature Act, in which the parts subject to alteration are thrown into a schedule separate from the body of the Act. In Jamaica the Civil Procedure Code of 1879,¹³⁷ based on the English Schedule of 1875, was replaced in 1889¹³⁸ by a Code based on the English R. S. C. 1883, divided into 52 titles and containing 676 sections, with 70 pages of Forms. This Code was originally an unalterable statute, and there was a provision in the Judicature Law, 1879,¹³⁹ that the Chief Justice, with the concurrence of the *puisne* judge, might make Rules for any procedural matter not expressly covered by the Code. But in 1902 that power was expressly extended to include the right to make Rules "for the purpose of revoking or amending all or any of the provisions of the Civil Procedure Code, 1888, . . . anything in the Civil Procedure Code aforesaid notwithstanding."¹⁴⁰ A large number of

¹³⁵ C. 172 of Revised Laws.

¹³⁶ S. 419.

¹³⁷ Law 39 of 1879.

¹³⁸ Law 40 of 1888.

¹³⁹ Law 24 of 1879, s. 36.

¹⁴⁰ Law 22 of 1902, s. 1.

revocations, alterations, and additions have been gazetted under this wider power, which furnishes the only instance of a procedural statute subsequently reduced to the status of Rules without having been repealed.¹⁴¹ Appeals from British Honduras lie to the Supreme Court of Jamaica, although there is a separate Supreme Court in Honduras for which its Chief Justice, by himself or with the concurrence of the puisne judges, is empowered to make Rules of procedure.¹⁴²

Besides Grenada the other three of the Windward Islands have codes of procedure drawn very largely from the English Rules, but two of them are statutes not subject to alteration by Rules. In Barbados there is still a separate Court of Chancery and Court of Common Pleas — one of the few remaining in all the British possessions — but the latest Common Pleas Act is a code in 27 Parts, containing 266 sections drawn principally from the English R. S. C.¹⁴³ The Code of Civil Procedure of St. Lucia, enacted in 1881, is in 1087 sections, a combination of the English Schedule of 1875 with the French Code.¹⁴⁴ But in St. Vincent the Supreme Court of Judicature Ordinance, 1880, leaves the framing of Rules for procedure entirely to the Chief Justice.¹⁴⁵ A Court

¹⁴¹ A collection of Rules made by the Supreme Court under both powers was published at Kingston in 1909, in 148 quarto pages.

¹⁴² Supreme Court Ordinance, c. ix, of Revised Statutes, 1914, s. 60. Under this, 121 Rules in 1888. These Rules, however, are merely supplementary to the Code of Civil Procedure, c. x of Revised Statutes, 1914, a statute of 339 sections copied from the English R. S. C.

¹⁴³ No. 6 of 1911. But under the Court of Chancery Act (no. 51 of 1891, s. 9) chancery practice is subject to rules. The present Rules are contained in 17 Orders of 1903, largely copied from the English R. S. C.

¹⁴⁴ See Royal Courts Ordinances, no. 13 and no. 29 of 1888.

¹⁴⁵ No. 14 of 1880, s. 68. A Code of Civil Procedure was passed a few years later (no. 2 of 1884) but it is expressly (s. 375) subject

of Appeal of the Windward Islands, made up of the four Chief Justices, hears appeals from the four Supreme Courts, according to Rules prescribed by it.

The Leeward Islands Supreme Court Consolidation Act, 1911, is an illustration of a very simple device for obtaining a procedural code with the minimum of difficulty. It enacts that:¹⁴⁶

"All the jurisdiction, powers, and authorities whatsoever possessed by, and vested in, the Supreme Court of the Leeward Islands shall in civil proceedings be exercised in conformity with the practice and procedure for the time being in force in England, which said practice and procedure, together with any law for the time being in force in England, authorizing or regulating the same, shall be deemed to be hereby extended *mutatis mutandis* to this Colony."

This is made subject to a power in the Chief Justice, with the concurrence of the puisne judge, to make Rules "limiting or excepting the operation of the said law, practice, and procedure." The only other instance of such complete incorporation by reference is the adoption of the Indian Code in the East African Colonies.

All the other Crown Colonies in the New World have handed over to their Chief Justices, either alone or with the concurrence of *puisne* judges, the power to make Rules. The only one of their statutes worthy of especial note is the Bahama Islands Act, in which the section on rule-making is worded with comprehensive brevity:¹⁴⁷

"It shall be lawful for the Chief Justice or the time being from time to time to frame General Rules and Orders for regulating in the simplest possible manner the conduct of all civil and criminal business and the pleading, practice, and procedure in all matters

to the rule-making power bestowed in 1880. In 1887 a set of 113 Rules was issued, some of which amend the Rules in the Code.

¹⁴⁶ No. 8 of 1911, s. 52.

¹⁴⁷ Supreme Court Act, 1896, 59 Vict., c. 26, s. 52. Under this there were issued in 1899 a set of 584 General Rules, drawn from the English R. S. C., 71 Rules for the Summary Side in 1908, and 33 Rules for the Probate Side in 1908.

both original and appellate in the Supreme Court coming within its cognizance in its various jurisdictions and on its several sides."

Powers of similar scope were bestowed in Trinidad and Tobago in 1902,¹⁴⁸ in Bermuda in 1905,¹⁴⁹ in British Guiana in 1893,¹⁵⁰ and in the Falkland Islands in 1901.¹⁵¹

In every case the power of the judges to make Rules is subject either to prior approval by the local executive, or to subsequent revocation of the Rules by the local legislature.

The great reforms of the Judicature Acts were not in substantive but in procedural law, and the Rule Committee is the personification of the new spirit in English courts of civil jurisdiction. The rule-making powers now reposed in the courts have laid forever the ghost of technicality; procedure is now no longer a game or mystery, and throughout the Empire "reality has been given to the legal rights of individuals." ¹⁵²

¹⁴⁸ Judicature Ordinance, Revised Laws 1902, no. 34, s. 46. The General Rules were issued in 1898, in 74 Orders, many copied from the English R. S. C., with Forms.

¹⁴⁹ Supreme Court Act, no. 4 of 1905, s. 22. In the same year were issued the Rules, in 71 Orders, nearly all from the English R. S. C.

¹⁵⁰ Supreme Court Ordinance, No. 7 of 1893, s. 58. Under this, the Rules of 1900, in 53 Orders, largely drawn from the English R. S. C.

¹⁵¹ Supreme Court Ordinance, No. 4 of 1901, s. 34.

¹⁵² To use the phrase of Professor Dicey (Law and Public Opinion).

CHAPTER XVII.

THE SUCCESS OF THE RULE COMMITTEE.

In many American States the recent expressions of public dissatisfaction with the working of legal machinery have impelled the lawyers to advocate a reform from within, to take the shape of transferring to the judiciary the power to regulate procedure which is now exercised almost exclusively by the several state legislatures. The English rule-making system is the model they point to. It does not detract from the manifest superiority of that system over one of direct legislation that there are minor details in which it might be improved, and it might be profitable to make some mention of objections which have been raised from time to time either to the system itself or to the manner in which the rule-making power has been used. In forty years much has been learned about defects in the former and mistakes in the latter. Some of them have been corrected, others are still the subjects of controversy.

First and foremost among adverse criticisms of the Rule Committee and the Rules is the long-continued complaint about inconsistencies and contradictions which are alleged to abound in the text of the Rules. There were 1,100 Rules in 1883, when the R. S. C. were last revised, and since then over 500 Rules have been altered or added to the code. The criticism is that the rule-makers have occasionally failed to bear in mind the reciprocal effect of dozens of these Rules upon each other, and have passed amendments which, though adequately fulfilling the purpose for which they were primarily intended, conflict with other passages in the Rules whose

text was left unchanged. It is almost a physical impossibility for judges, hard pressed by the demands and responsibilities of their work in the High Court and the Court of Appeal, to be so conversant with every phrase and section of so large a body of rules as to be able to guard against such errors. Contradictions are numerous in the Rules, and those whose business it is to study them closely, word for word from beginning to end, have often called attention to the fact.

Much was said and published upon this around 1893, when the drafting of amendments was not as careful as it has been at other times, and a strong demand for complete revision of the whole R. S. C. made itself felt. One of the letters written by Mr. Snow at that time put the matter in the following words:

"Legal machinery grows yearly both in bulk and complexity — a growth which is likely to increase rather than diminish. It is at once the most uninviting and the most indispensable part of the law . . . The mere bulk of the Rules of the Supreme Court is now very great, and many of the rules and groups of rules are so interdependent upon other rules or groups of rules, or upon sections of Acts of Parliament, that it is almost impossible to introduce a new rule, or a group of new rules, without bringing about results not foreseen. Having regard to the onerous duties of your office, it is impossible for your Lordships, or the Rule Committee, to have present to your minds, when dealing with matters of procedure and practice, all, or even a large part, of the many points which are certain to arise when such rules are put into practice."¹

Mr. Snow was for many years editor of the *White Book* (in which capacity he was able to gather information of many specific defects in the Rules), so that his statement carries the weight of experience and technical knowledge. His opinion was, to be sure, ratified by the Rule Committee when he was engaged to conduct a revision of the

¹ Part of a letter in which he pointed out contradictions in the Rules newly made for the Arbitration Act, 1889; the letter is published in 25 Law Journal, 268 (May 3, 1890).

Rules in 1894, although the revision itself failed of acceptance.

Another expert on the Rules who has given public expression to his knowledge of inconsistencies in them is Master T. Willes Chitty, of the King's Bench Division, who has for some time edited the Red Book, the other annual commentary on the Judicature Acts and Rules. In his testimony before the 1913 Royal Commission on Delay in the King's Bench Division,² he laid much stress upon the failure of the Rules on summonses for directions to complement properly the Rules on proceedings under such summonses, and he commented upon the flat contradictions, in respect to pleadings, between many of the Rules and Forms. In another place he says: "A very slight acquaintance with the Forms and the Rules is required to convince the practitioner that both are in need of revision."³ Master Charles Burney, in his article on "Rules" in the *Encyclopaedia of the Laws of England*,⁴ said of the present rule-making system:

"Valuable as these provisions have proved in simplifying the practice and procedure of the Courts, it cannot be denied that there is room for improvement. Inconsistencies, anachronisms, incongruities, are present in the Rules, which ought to be swept away."

These are opinions by quasi-judicial officers whose daily duty it is to apply the Rules to actual cases before them.

These inconsistencies are due not only to a failure to bear in mind all the consequences of an amendment in a series of interdependent rules, but sometimes to slovenly or hurried draftsmanship. This is another of the grounds of complaint against some of the R. S. C. Inelegant and

² Parl. Paper, 1913, Cd. 6762, Minutes of Evidence, vol. i, pp. 21 *et seq.*

³ Preface to his "King's Bench Forms" (14th ed., 1912).

⁴ 2d ed. (1908), vol. xiii, p. 59.

careless drafting in statutory rules produces not only inconsistencies with other rules, but uncertainty as to the meaning of the Rules themselves. It must be acknowledged that by far the largest portion of the present code contains clear, concise English, which has stood the test of time and interpretation, and been copied in Rules of Court all over the Empire; but at certain periods in the thirty years of its life supervision over amendments was a trifle lax, and those periods have left their traces in the Rules. Public criticism on a point of this sort is usually somewhat reserved, but occasionally frank opinions get into print. For instance, this passage from a letter in a legal journal in 1886:

"Practitioners have been and are sorely distracted by the numerous alterations of the last ten years . . . Practical men peruse the rules, from time to time altered, annulled, restored, and reamended, and blush for the responsible authors." ⁵

*And this line, editorially written in the same journal in 1893:

"One striking thing about Rules of the Supreme Court nowadays is their lack of finish." ⁶

Legislative drafting is an art that has been carried to a high degree of excellence in England, but there are some parts of the Rules whose form does not receive high commendation from the experts.

Objection is often raised to the frequency with which the Rules have been amended. Since 1883 nearly half the 1100 Rules in the Code have been amended or annulled. To a certain extent this was inevitable—changing conditions called for changes in procedure; again, observation of the Rules at work brought out many points in which they could be improved, which it would have been wrong to neglect. But some critics appear

⁵ 30 Solicitors' Journal, 154 (January 2, 1886).

⁶ 38 Solicitors' Journal, 124 (December 23, 1893).

to believe that the need for change has been exaggerated. Lord Davey, among them, in his article on "Judicature Acts" in the *Encyclopaedia Britannica*,⁷ said of the Rules:

"Complaints are made that they go into too much detail, and place a burden on the time and temper of the busy practitioner, which he can ill afford to bear . . . Rules have sometimes been made to meet individual cases of hardship, and rules of procedure have been piled up from time to time, sometimes embodying a new experiment, and not always consistent with former rules."

Lord Davey was never a member of the Rule Committee. In similar vein is this outburst of a writer in the *Solicitors' Journal* in 1894:⁸

"If anyone supposes that a solicitor with a good practice has time at his disposal to follow this bewildering kaleidoscope of procedure regulations, he has a most inadequate idea of the daily requirements of a solicitors' business. Solicitors are only human after all, and they are rapidly becoming oppressed by the masses of new procedure rules, and repeals of old rules, which are pitched into the pathway of their daily work with inconsiderate liberality."

Since that time four practitioners have been added to the Committee to give it an "adequate idea" of their requirements. There may be too many Rules issued by the Committee: it is a fault to be guarded against. It is, however, a fault far easier to put up with than the old rigidity of procedure that marked the period before the Rule Committee came into being. "It is the natural course in things judicial," says Mr. Birrell, in his entertaining essay on *Bills in Equity*⁹ "for a procedure to stiffen as in an arctic frost." Every batch of new rules, therefore, thaws out a bit of the stiffness.

A fourth cause of complaint occasionally heard against the Rule Committee is that its powers are too great. In

⁷ Written for the 1902 Supplement to the 9th edition. In the present (the 11th edition) it appears, slightly revised, in vol. xv, p. 541.

⁸ 39 *Solicitors' Journal*, 92 (December 8, 1894).

⁹ *A Century of Law Reform*, p. 179 (London, 1901).

1883, when Lord Selborne's revision of the Rules was first published, there was some effort to have its taking effect postponed by Parliament, Lord Halsbury (then Sir Hardinge Giffard) leading the opposition in the Lower House. In his address¹⁰ he protested against what he termed "this silent and secret mode of altering the law," and complained that the Rule Committee was able to legislate without public knowledge of its proceedings. This objection was eventually removed by the Rules Publication Act in 1893. The habit of Parliament to delegate to the Rule Committee and to similar authorities the power to supply the details for the operation of statutes has grown steadily, but the opinion is sometimes expressed that it is carried too far.

As one legal journal explains:¹¹

"The origin of this propensity to leave matters to be settled by rules was probably in part an appreciation of the convenience to a legislator who is in a hurry of presenting to Parliament a sketch only of his proposals, asking for authority to complete them by rules at his leisure; and in part, a notion that opposition to a measure will be obviated if debateable details will be left out of it. We have repeatedly called attention to the dangers of this practice."

Especially in the last few years, there has been great dissatisfaction with the manner in which controversial Acts have been rushed through Parliament, leaving wide discretionary authority to executive and judicial officers for the framing of rules to fill up their gaps. This is an objection which applies to all latter-day legislation, and not only to statutes throwing such duties upon the Rule Committee.

Lastly, it has been argued that the very elasticity introduced into civil procedure by the rule-making system has been the source of tremendous litigation, and that thousands of reported decisions on procedural questions

¹⁰ Hansard (August 11, 1883).

¹¹ 37 Solicitors' Journal, 677 (August 5, 1893).

attest the extravagance of constant alterations that require fresh judicial interpretation. Mr. Hepburn, in his "Development of Code Pleading," makes the following remark, *apropos* of Mr. Snow's calculation that from 1875 to 1890, over 4,000 decisions were handed down in the English courts upon questions of procedure:¹²

"Ever fruitful of contention and delay, a changeable procedure is a grievous burden to the community, which must pay the price of interpreting all new regulations of procedure, whether by Rules of Court or direct enactments."

But the prospect is not quite so gloomy as all that, as a little inspection of the figures will show. In the fifteen years for which Mr. Snow quotes, there were begun annually an average of 80,000 proceedings of all sorts in the several Divisions of the High Court; one sees at a glance how small a proportion of these were involved in an annual average of 275 decisions on procedural questions. To come down to more recent times, the official judicial statistics for the last few years show that of the enormous number of procedural questions decided by the masters, less than one-thirtieth are appealed to the Judge in Chambers. Of those, more than three-fourths go no further and are never heard in Court: the other one-fourth form the residue of disputes sufficiently two-sided to be submitted to the Court of Appeal. In actual number they are less than one-half per cent of the total number of proceedings annually commenced in the High Court — surely not a cause for apprehension.

From this review it is evident that though some of the objections to the Rule Committee's results are not entirely justified, there are valid reasons for seeking to improve its machinery, and especially to minimize the possibility of its issuing Rules whose meaning is not clear, or whose form is such that they will conflict with other

¹² Cincinnati, 1897, p. 198.

portions of the code, or prove to be impractical in actual operation. To effect this object, practitioners and others have put forward many suggestions, from which a few selections may be of interest. They are addressed either to changes in the constitution of the Committee or to improvements in its methods of work.

As to the former, the point of attack has always been that judges are either too busy or too far removed from the details of office work and practice to draft rules carefully, or even to know what effects will follow a rule they have taken pains to draft. Parliament acknowledged the force of this contention by adding to the Committee a solicitor and two barristers in 1894 and a second solicitor in 1909. It is still felt, however, that those who are most intimate with the details of practice are unrepresented. The masters of the Supreme Court are, of course, the persons whose knowledge of the Rules is, by reason of their official duties, most complete, and the natural course would seem to be to place at the service of the Committee the knowledge of at least one of these important officers.¹³ The present Newfoundland Judicature Act sets up a Rule Committee of which the registrar of the Supreme Court (being a barrister), is *ex officio* a member.¹⁴ In India, the present Code of Civil Procedure makes provision for a Rule Committee to be attached to each of the six High Courts, and for a secretary, with separate remuneration, for each such Committee.¹⁵ In all the High Courts except that at Calcutta, where no Committee has yet been appointed, the registrar of the High Court has been made the Committee's Secretary. There are, therefore, precedents for admitting to the English Rule Committee in

¹³ In the King's Bench Division the Masters are barristers, in the Chancery Division they are solicitors.

¹⁴ 4 Edw. VII, c. 3, ss. 275-6.

¹⁵ Act V of 1908, s. 123 (5).

some capacity one of the Supreme Court masters, who fulfill the same functions as the registrars in the Courts named. In his testimony before the Royal Commission on Delay in the King's Bench Division, Master Chitty made a strong argument for adding one of the masters to the Committee,¹⁶ but the suggestion was not embodied in the Commission's Report.

It is recognized, however, that either a master or some other officer could act as technical adviser to the Committee without actually being a member of it, and this form of alteration in the personnel of the Committee seems to meet with more support than the other. In reply to Master Chitty, Mr. Charles Henry Morton, of Liverpool, a member of the Royal Commission and also one of the present solicitor members of the Rule Committee, said:

"There is a feeling that the High Court Rule Committee ought not to have Masters there. I know there is such a feeling, but I do not quite know the reason. Would not your suggestion be given effect to if there was a secretary or official in the nature of a secretary, a skilled man who was made a standing secretary to the Committee — whose duty it should be to receive suggestions from the Masters and practitioners and regularly to bring those suggestions before the High Court Rule Committee for consideration?"

In that form the proposal to aid the Committee by some sort of expert assistance has been made more than once. As early as 1890, Mr. Snow, in one of the letters he wrote to the judges to disturb their peace of mind about the R. S. C., suggested that they could avoid the technical difficulties of rule-making by appointing some official, either as permanent adviser or secretary, who not only could keep the revision of the Rules up to date, but would receive suggestions and complaints from the public and from the profession, and formulate them before submission to the Committee, so that only the

¹⁶ Parl. Pap., 1913, Cd. 6,762, Minutes of Evidence, vol. i, p. 29.

question of principle need be argued, not that of form. "Clerk of the Rules," he suggested, might be an appropriate title for such an officer.¹⁷ Ten years ago the report of a similar suggestion was reproduced in the following item in the Solicitors' Journal.¹⁸

"The President of the Liverpool Law Society (Mr. F. Marton Hull), in his address at the annual meeting of the society, threw out a suggestion which it is hoped will not be lost sight of. He proposed the appointment as assistant-secretaries to the Rule Committee of a practising barrister and a practising solicitor, to whom suggestions could from time to time be made upon rules and orders, so that due consideration could be given to any proposals before they are brought before the Rule Committee. The idea appears to be an excellent one. . . ."

Owing to the coincidence that the present Permanent Secretary to the Lord Chancellor,¹⁹ who has acted as Secretary to the Rule Committee for over thirty years, has special professional qualifications which have enabled him to take a most active and invaluable part in the Rule Committee's work, there has been no reason up to the present to regard these suggestions as touching upon a pressing need. But when the time comes for him to resign the duties of his office, the whole subject will be opened for discussion, and some definite policy adopted which will probably extend to the County Courts Rule Committee as well.

A rather more elaborate arrangement is that suggested by Mr. Francis A. Stringer, the head of one of the departments in the Central Office, and one of the present editors of the White Book. In an address delivered before

¹⁷ 25 Law Journal, 268 (May 3, 1890).

¹⁸ 49 Solicitors' Journal, 77 (December 3, 1904).

¹⁹ Sir Kenneth Muir Mackenzie, G.C.B., K.C. In June, 1915, he became Lord Muir Mackenzie and was succeeded in office by Sir Claude Schuster, but the war has postponed consideration of this question until more peaceful times.

the Solicitors' Managing Clerks' Association in 1902,²⁰ he pointed out that the Rules of the Supreme Court contain Rules of two distinct types — those in which principles of procedure are embodied, and those which are mere practical directions for giving effect to those principles. He proposed that the Rule Committee of judges should confine its attention to the Rules embodying principle; as to the Rules of practical direction, he would have them drawn or altered by a body subordinate to the Rule Committee — a body composed of masters, registrars, solicitors' managing clerks, and others, whose daily work consisted in following the practical directions in the Rules. "Actual knowledge of procedure should be the one essential qualification" in making up this subordinate board (to quote from an article on the same subject published by Mr. Stringer in 1899²¹), "and not necessarily professional qualification." Such a board would be in close touch with the actually practising elements of all branches of the profession, and could frame satisfactory rules, either of its own motion or upon the request of the Rule Committee, to be approved by the Committee before they were issued.

One suggestion dealing solely with the methods and not at all with the composition of the Committee is that there should be some fixed plan for periodic revision of the entire Code of Rules. The Irish Rules, first issued in 1877, were revised in 1891, and again in 1905; the Ontario Rules, issued in 1881, were revised in 1888, then again in 1897, and once more in 1913; the English County Court Rules were revised in 1875, 1886, 1889, and 1903, and there is now a fresh revision under way.²² So also,

²⁰ Reported in 46 *Solicitors' Journal*, 412 (April 12, 1902).

²¹ 43 *Solicitors' Journal*, 363 (April 1, 1899).

²² Not to mention three revisions prior to the Judicature Acts: 1851, 1856, and 1868.

it is argued, the English Supreme Court Rules ought to be carefully edited, and all redundancies eliminated, at recurrent periods. Certainly the present code, cumbered by the accretions of thirty years of amendment, is badly in need of revision; that was recognized as far back as 1894, when Lord Herschell had a revision put in hand, which, though completed two years later, was never accepted by the Rule Committee.

Another possibility, for making easier the authoritative interpretation of passages in the Rules, is that the Rule Committee should have some share in deciding appeals taken from interpretations put upon Rules in Chambers. Some time ago, before the present arrangement of a Judge in Chambers was devised, there was a demand for a special Practice Court, or at least for the regular allocation of practice appeals to the list of one particular judge, who should be expert in the subject.²³ The creation of the Judge in Chambers largely satisfied that demand, without running counter to the modern distaste for separate Courts of special jurisdiction. But there is still the difficulty that the Judge in Chambers changes from month to month, and often from week to week; also that his decisions are not reported, and are, therefore, not available as precedents; so that there is no certainty of uniformity in his decisions. Appeals may be taken to him from the masters repeatedly on the same point, and each time he will consider the point *de novo*, except so far as he chooses to be guided by hints as to what other judges have decided in Chambers. Parties may and often do, with his leave, appeal from him to the Court of Appeal, and there, of course, the reported decisions give some indications of how the Court will decide. But it is hard for a litigant to understand why he should have to pay the costs of having the Court of

²³ See article in 38 Solicitors' Journal, 19 (November 11, 1893).

Appeal interpret rules apparently made by the judges for their own guidance.

To remedy this, the suggestion is that the Judge in Chambers might, under the power of the Court to order special references, order practice questions of first impression to be referred specially to the Rule Committee, for them to report whether or not the rule in question, as they understand it, applies to the case in point. This would require some such special assistance for the Rule Committee as has been mentioned in the preceding pages. Such decisions, if reported, might well be considered binding interpretations of the Rules, especially in view of the fact that the Rule Committee have, over a score of times since 1883, passed Rules intended to counteract judicial decisions in which not only the Court of Appeal, but even the House of Lords have sought by construction to limit or restrict the operation of particular Rules.²⁴

In conclusion, it may not be supererogation to point to the development of English civil procedure since 1875 as the result of careful and intelligent study by some of the best minds of the English Bench and Bar. The close association of the rule-making body with the Lord Chancellorship has been a factor of great potency in keeping its work up to a standard befitting the dignity of that office, but even apart from that influence, the Rule Committee has, with few breaks since it was established, uniformly benefited by the services of the most able lawyers in England. Starting its career under the auspices of two such giants as Lord Selborne and Lord Cairns, careful not to throw aside too much of the procedure with which older practitioners were familiar, but constantly changing and developing the Rules intrusted to its care, it has brought civil procedure to a

²⁴ See O. 3, R. 6 (F); O. 11, R. I (A); O. 16, R. 1; O. 16, R. 8; O. 16, R. 54 (A); O. 31, R. 29; O. 48 A, R. 7; O. 65, R. 6 (A), etc.

point where the following words, written of it by Lord Bowen in 1887 and still true to-day, are not a whit too high in its praise:²⁵

"A complete body of rules — which possess the great merit of elasticity, and which (subject to the veto of Parliament) is altered from time to time by the judges to meet defects as they appear — governs the procedure of the Supreme Court and all its branches. In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes — upon oral evidence or affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading, or proceeding, that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not *possible* in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move."

This is, as Professor Dicey remarks, a masterly picture of the actual administration of the law drawn by one of the ablest and most enlightened of the English judges, and it leaves no room for doubt upon the merits and success of the English rule-making authority.

²⁵ The passage is from an essay on the Administration of the Law, in a jubilee symposium entitled *The Reign of Queen Victoria*, vol. i, p. 309 (London, 1887). It is quoted in Dicey: *Law and Public Opinion*, p. 207 (London, 1905), with the following comment: "Any critic who dispassionately weighs these sentences, notes their full meaning, and remembers that they are even more true in 1905 than in 1887, will partially understand the immensity of the achievement performed by Bentham and his school in the amendment of procedure — that is, in giving reality to the legal rights of individuals."

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